No. 14-86

Title:	Equal Employment Opportunity Commission, Petitioner v. Abercrombie & Fitch Stores, Inc.
Docketed:	July 28, 2014
Linked with 13A1139	
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(11-5110)
Decision Date:	October 1, 2013
Rehearing Denied:	February 26, 2014

Questions Presented

---Date---	----Proceedings and Orders----------
May 16 2014	Application (13A1139) to extend the time to file a petition for a writ of certiorari from May 27, 2014 to June 26, 2014, submitted to Justice Sotomayor.
May 19 2014	Application (13A1139) granted by Justice Sotomayor extending the time to file until June 26, 2014.
Jun 16 2014	Application (13A1139) to extend further the time from June 26, 2014 to July 25, 2014, submitted to Justice Sotomayor.
Jun 17 2014	Application (13A1139) granted by Justice Sotomayor extending the time to file until July 25, 2014.
Jul 25 2014	Petition for a writ of certiorari filed. (Response due August 27, 2014)
Aug 27 2014	Brief amici curiae of Religious Organizations filed.
Aug 27 2014	Brief of respondent Abercrombie & Fitch Stores, Inc. in opposition filed.
Sep 10 2014	Reply of petitioner Equal Employment Opportunity Commission filed.
Sep 10 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 2 2014	Petition GRANTED.
Oct 9 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 26, 2014.
Oct 9 2014	The time to file respondent's brief on the merits is extended to and including January 15, 2015.
Nov 17 2014	Order further extending time to file the joint appendix and petitioner's brief on the merits to and including December 3, 2014.
Nov 17 2014	Order further extending time to file respondent's brief on the merits to and including January 21, 2015.
Dec 3 2014	Joint appendix filed. (Statement of costs filed.)
Dec 3 2014	Brief of petitioner Equal Employment Opportunity Commission filed.
Dec 9 2014	Brief amicus curiae of Umme-Hani Khan filed.
Dec 10 2014	Brief amicus curiae of The Becket Fund for Religious Liberty filed.

Dec 10 2014	Brief amici curiae of American Jewish Committee, et al. filed.
Dec 10 2014	Brief amicus curiae of American-Arab Anti-Discrimination Committee, et al. filed.
Dec 10 2014	Brief amici curiae of National Jewish Commission on Law and Public Affairs, et al. filed.
Dec 10 2014	Brief amicus curiae of Lambda Legal Defense and Education Fund, Inc. filed.
Dec 10 2014	Brief amici curiae of Fifteen Religious and Civil Rights Organizations filed.
Dec 10 2014	Brief amici curiae of Arizona, et al. filed.
Dec 10 2014	Brief amicus curiae of The Council on American-Islamic Relations filed.
Dec 22 2014	SET FOR ARGUMENT ON Wednesday, February 25, 2015
Dec 22 2014	Record requested from U.S.C.A. 10th Circuit.
Dec 30 2014	Record received from U.S.C.A. 10th Circuit. The record is electronic and located on PACER, also received 1-Box of pleadings in the case.
Jan 7 2015	CIRCULATED.
Jan 21 2015	Brief of respondent Abercrombie & Fitch Stores, Inc. filed. (Distributed)
Jan 28 2015	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)
Jan 28 2015	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. (Distributed)
Jan 28 2015	Brief amici curiae of The National Conference of State Legislatures, et al. filed. (Distributed)
Jan 28 2015	Brief amicus curiae of Cato Institute filed. (Distributed)
Feb 18 2015	Reply of petitioner Equal Employment Opportunity Commission filed. (Distributed)
Feb 25 2015	Argued. For petitioner: Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Shay Dvoretzky, Washington, D.C.
Jun 1 2015	Judgment REVERSED and case REMANDED. Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Thomas, J., filed an opinion concurring in part and dissenting in part.

14-86

NO.

SUPREME COURT, U.S.
FILED
JUL 25 2014

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
JENNIFER S. GOLDSTEIN
Acting Assistant General Counsel
JAMES M. TUCKER
Attorney
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
IAN HEATH GERSHENGORN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1). "Religion" includes "all aspects of religious observance and practice" unless "an employer demonstrates that he is unable to reasonably accommodate" a religious observance or practice "without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

The question presented is whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

PARTIES TO THE PROCEEDING

Petitioner, the Equal Employment Opportunity Commission, was the plaintiff in the district court and the appellee in the court of appeals.

Respondent Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids, was the defendant in the district court and the appellant in the court of appeals.

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Miscellaneous:

U.S. Equal Emp't Opportunity Comm'n:
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In the Supreme Court of the United States

No.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-91a) is reported at 731 F.3d 1106. The opinion and order of the district court (App., *infra*, 92a-120a) is reported at 798 F. Supp. 2d 1272.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2013. A petition for rehearing was denied on February 26, 2014 (App., *infra*, 121a-123a). On May 19, 2014, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to

and including June 26, 2014. On June 17, 2014, Justice Sotomayor further extended the time to July 25, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 126a-137a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer * * * to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1). "Religion" is defined to include those "aspects of religious observance and practice" that an employer is able to "reasonably accommodate * * * without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). As a result, an employer has an obligation "to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. 1605.2(b)(1).

2. a. Respondent operates clothing stores under brand names including Abercrombie & Fitch, Abercrombie Kids, and Hollister. The company refers to its sales employees as "Model[s]" and requires them to comply with a "Look Policy." The Look Policy is in-

tended to showcase respondent's brand, which "exemplifies a classic East Coast collegiate style of clothing." App., *infra*, 2a-3a (internal quotation marks omitted). The policy contains rules for clothing, jewelry, facial hair, and footwear; as relevant here, it prohibits employees from wearing black clothing and "caps." *Id.* at 3a. The policy does not define the term "cap," but the district manager covering the store at issue here interpreted the policy to prohibit headscarves. *Ibid.*; *id.* at 9a.

Respondent has policies that govern its hiring process as well. Interviewers evaluate applicants using the company's "official interview guide," which requires interviewers to consider the applicant's "appearance & sense of style," whether the applicant is "outgoing & promotes diversity," and whether the applicant has "sophistication & aspiration." Applicants are rated on a three-point scale in each category. An applicant who receives a score in "appearance" of less than two, or a total score of five or less, is not recommended for hiring. App., *infra*, 8a.

b. Samantha Elauf, who identifies as a Muslim, applied for a "model" position at an Abercrombie Kids store operated by respondent in the Woodland Hills Mall in Tulsa, Oklahoma. Elauf, who was 17 years old at the time she applied to work in the store, has worn a headscarf (or hijab) since she was 13 years old and testified that she does so for religious reasons. Prior to her interview, Elauf asked a friend who worked at the store, Farisa Sepahvand, whether she would be allowed to wear a headscarf if she worked there. App., *infra*, 5a. Sepahvand raised the issue with Kalen McJilton, an assistant manager at the store. McJilton

noted that he had previously worked at a store operated by respondent with an employee who wore a white yarmulke, and told Sepahvand that he did not see any problem with Elauf's wearing a headscarf, "especially if she didn't wear a headscarf that was black." Sepahvand then told Elauf that she would not be able to wear a black headscarf. Elauf seemed agreeable to that restriction. *Id.* at 6a.

Elauf was interviewed for a "model" position at the Abercrombie Kids store by Heather Cooke, an assistant store manager. Elauf wore a black headscarf to the interview. Cooke had seen Elauf wearing a headscarf on other occasions as well. Cooke later explained that though she "did not know" Elauf's religion, she "assumed that she was Muslim" and "figured that was the religious reason why she wore her head scarf." App., *infra*, 7a. During the interview, Cooke described some of respondent's dress requirements, but did not state that any company policy would bar Elauf from wearing a headscarf. Indeed, neither Elauf nor Cooke raised the topic of Elauf's headscarf at all during the interview. *Id.* at 7a-8a.

Cooke considered Elauf a good candidate for a "model" position, but was unsure whether Elauf's headscarf was permitted under the Look Policy. She initially gave Elauf two out of three points on each of the three prescribed criteria—"appearance & sense of style," "outgoing & promotes diversity," and "sophistication & aspiration." This score amounted to an assessment that Elauf "meets expectations" and should be hired. App., *infra*, 8a. Because of her uncertainty about the headscarf, however, Cooke consulted with district manager Randall Johnson before extending a

job offer. *Id.* at 8a-9a. Cooke later explained in a deposition that when she sought guidance about hiring Elauf, she told Johnson she believed Elauf was a Muslim who wore a headscarf for religious reasons.[1] *Ibid.* According to Cooke, Johnson told her that Elauf should not be hired because even if Elauf wore the headscarf for religious reasons, it was not permitted under respondent's Look Policy. *Id.* at 9a, 100a-101a. Johnson told Cooke to change Elauf's "appearance" score from two to one, which would result in her not being hired. *Id.* at 9a. Cooke did so, filling out a new form and throwing away the original interview sheet. *Ibid.* Elauf later learned from Sepahvand that she had not been hired because of her headscarf. *Ibid.*

The U.S. Equal Employment Opportunity Commission (EEOC) filed suit against respondent, alleging that the company had violated Title VII by "refus[ing] to hire Ms. Elauf because she wears a hijab" and "fail[ing] to accommodate her religious beliefs by making an exception to the Look Policy." App., *infra*, 9a. Both parties moved for summary judgment. *Id.* at 10a.

3. The district court granted summary judgment to EEOC. App., *infra*, 92a-120a.

The district court approached the case using the burden-shifting method that courts of appeals have employed in assessing religious accommodation claims at the summary judgment stage. Under that approach, modeled on the framework in *McDonnell-*

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[1] In his deposition, Johnson denied that he had been advised that Elauf wore a headscarf for religious reasons. Pet. App. 9a. Because the court of appeals ordered summary judgment in favor of respondent, all factual disputes must be resolved in favor of EEOC. See *Crawford* v. *Metropolitan Gov't*, 555 U.S. 271, 274 n.1 (2009).

Douglas Corp. v. *Green*, 411 U.S. 792 (1973), a plaintiff alleging a failure to hire must make a prima facie showing that (1) the applicant had a bona fide religious belief that conflicts with an employment requirement; (2) she informed the employer of this belief; and (3) she was not hired for failing to comply with the employment requirement. App., *infra*, 108a-109a (citing *Thomas* v. *National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000)). If the plaintiff makes that showing, the burden shifts to the defendant to rebut one or more elements of the plaintiff's case; to show that it offered a reasonable accommodation of religious practice; or to show that it was unable to accommodate the employee's or applicant's religious needs without undue hardship. *Id.* at 109a (citing *Thomas*, 225 F.3d at 1156).

The district court found that EEOC had established all the elements of a prima facie case and that respondent had not rebutted them. The court observed that the case presented a dispute regarding whether an employee or applicant was required to provide explicit verbal notice of the need for an accommodation in order for an employer to have adequate notice for the purposes of Title VII. App., *infra*, 115a. The district court rejected this explicit-notice rule, adopting instead the position of EEOC and other courts that "the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." *Ibid.* (citing *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied,

516 U.S. 1158 (1996); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Hellinger* v. *Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999)).

The district court found this rule better served the objectives of Title VII than a rule requiring explicit, direct notice. A rule requiring an employer to have enough information to be made aware of a conflict is sufficient to "prevent ambush of an unwitting employer." App., *infra*, 117a. Such a rule also serves Title VII's objective of encouraging an interactive process in which employers and employees strive for mutually acceptable accommodations. See *id.* at 116a-117a (discussing *Thomas*, 225 F.3d at 1155; *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1171-1172 (10th Cir. 1999)). Under a rule requiring explicit and direct notice from an employee, however, no interactive process would occur in cases in which only the employer is aware of a potential conflict, because job applicants cannot be expected to request an accommodation when they are unaware that a conflict exists. *Id.* at 118a n.11. Here, "there could be no bilateral, interactive process of accommodation because, although [respondent] was on notice that Elauf wore a head scarf for religious reasons, it denied Elauf's application for employment without informing her she was not being hired or telling her why." *Ibid.*

Applying its construction of the notice requirement to Elauf's situation, the district court concluded that respondent had received adequate notice of a religious conflict requiring accommodation because it was "undisputed" that Elauf wore her headscarf at the interview with Cooke, and because Cooke "knew [Elauf] wore the head scarf based on her religious belief."

App., *infra*, 117a. The court also concluded that EEOC had shown that Elauf wore a headscarf as part of her Muslim faith and that respondent declined to hire Elauf because her headscarf conflicted with its Look Policy. *Id.* at 109a-115a. The court found that respondent had not rebutted any of these showings, and that respondent had not shown that granting Elauf a religious accommodation would have resulted in "undue hardship." *Id.* at 120a. Accordingly, the court ordered summary judgment in favor of EEOC as to liability. *Ibid.* After a trial limited to damages, a jury awarded $20,000 in compensation. *Id.* at 12a.

4. a. The court of appeals reversed, ordering summary judgment in favor of respondent. App., *infra*, 1a-91a. The court held that respondent had not received adequate notice of the need for a religious accommodation because only explicit, verbal notice of a conflict directly from an applicant or employee could suffice. *Id.* at 28a. As the court saw it, "a plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule." *Ibid.*; see *id.* at 46a. The court expressly rejected EEOC's contrary position that Title VII is satisfied by notice "from an affirmative statement by the individual, *or some other source*." *Id.* at 30a.

The court of appeals "recognize[d] that some courts have taken a different path on this question" but stated that the court was "confident" that it was correct to require explicit and direct notice from the employee or

applicant. App., *infra*, 46a. The court found support in its own prior cases stating that a plaintiff must establish that an employee "informed his or her employer" of the religious belief requiring accommodation. *Id.* at 30a (quoting *Thomas*, 225 F.3d at 1155); see *id.* at 32a-33a.

The court further concluded that its approach appropriately apportioned burdens under Title VII because important facts about the religious beliefs of an applicant or employee are typically known only to the applicant or employee. App., *infra*, 46a. In particular, only an applicant or employee would typically know if particular practices reflected religious faith or simply personal preferences or culture. *Id.* at 46a-50a. Similarly, the court reasoned, only an applicant or employee would typically know whether the belief underlying a religious practice was inflexible, which the court understood to be a requirement in order for a practice to merit accommodation under Title VII. *Id.* at 52a-53a. In addition, the court found its rule to be most compatible with EEOC's practice of discouraging employers from inquiring as to an applicant's religious beliefs as part of the hiring process. *Id.* at 53a-55a.

The court of appeals found its conclusion was also supported by EEOC policy materials. App., *infra*, 55a. Those describe an employer as having an obligation to reasonably accommodate religious practices "[a]fter an employee or prospective employee notifies the employer * * * of his or her need for a religious accommodation," 29 C.F.R. 1605.2(c)(1), which the court took to imply that an employer has no obligation unless the employee has given explicit notice. App., *infra*, 55a-56a. The court stated that agency manuals

reinforced that conclusion, by explaining that an applicant or employee "must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work" and "cannot assume that the employer will already know or understand it." *Id.* at 56a.

Applying its rule, the court of appeals concluded that respondent was entitled to summary judgment because respondent had not received notice of a conflict through Elauf's verbal statements, and because any notice that respondent received was insufficiently explicit. "[T]here is no genuine dispute of material fact," the court wrote, "that Ms. Elauf never informed [respondent] before its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommodation for that practice, due to a conflict between it and [respondent's] clothing policy." App., *infra*, 28a.

The court of appeals added that even if Title VII permitted notice to come from a source other than a job applicant or employee herself, the notice respondent received would fall short, because Title VII requires "an employer's particularized, *actual* knowledge of the key facts that trigger its duty to accommodate." Pet. App. 34a; see also *id.* at 39a-40a. The court concluded that constructive knowledge is categorically insufficient to meet this standard, explaining that liability would not attach because an "employer should have guessed, surmised, or figured out from the surrounding circumstances, that the practice was based upon [an applicant's or employee's] religion and that the plaintiff needed an accommodation for it." *Id.* at 39a; see also *id.* at 42a n.9.

The court of appeals also found insufficient an employer's correct inference that a conflict existed. It was not relevant, the court concluded, that Cooke had correctly "assumed that Ms. Elauf wore her hijab for religious reasons and felt religiously obliged to [do] so," App., *infra*, 40a (emphasis omitted), because "a correct assumption does not equal actual knowledge," *id.* at 42a n.9. The court of appeals added that in its view, because respondent's employees lacked "particularized, actual knowledge" of Elauf's beliefs, *id.* at 40a, EEOC would not have prevailed even in those circuits that do not have a requirement of explicit and direct notice, see *id.* at 36a-39a.

b. Judge Ebel concurred in part and dissented in part. App., *infra*, 73a-91a. He dissented from the court's construction of the notice requirement under Title VII, arguing that the court's holding was illogical, *id.* at 74a-81a, and split from the approaches of other courts of appeals, *id.* at 84a-88a.

Judge Ebel explained that an inflexible notice requirement undermines Title VII in cases where an employer is aware of a conflict but an employee is not. In this case, he noted, "the reason Elauf never informed" respondent of the conflict between her religious practice and respondent's Look Policy was that "Elauf did not know that there was a conflict." App., *infra*, 76a. In contrast, respondent "did know there might be a conflict, because it knew that Elauf wore a headscarf, assumed she was Muslim and that she wore the headscarf for religious reasons, and knew its Look Policy * * * prohibited its sales models from donning headwear." *Ibid.* Judge Ebel explained that permitting an employer to refrain from hiring an applicant

based on what the employer understood to be a religious practice was inconsistent with Title VII, because it enabled respondent "to avoid any interactive dialogue with Elauf about whether [respondent] could reasonably accommodate Elauf's religious practice." *Ibid.*

Judge Ebel noted that the majority "creat[ed] a conflict among the circuits" by disagreeing with the courts that "permit a plaintiff to establish a prima facie failure-to-accommodate claim by establishing that the employer knew, by any means, of a conflict between the plaintiff's religious practices and the employer's work rules." App., *infra*, 87a; see *id.* at 85a-86a & n.7 (discussing *Dixon*, 627 F.3d at 855-856; *Brown*, 61 F.3d at 652-653; *Heller*, 8 F.3d at 1436-1437; *Hellinger*, 67 F. Supp. 2d at 1361-1363). Other circuits, he explained, "conclude that '[a]n employer need have "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements."'" *Id.* at 86a (quoting *Brown*, 61 F.3d at 654 (brackets in original); *Heller*, 8 F.3d at 1439). Judge Ebel stated that he would adopt those courts' approach, at least in cases in which an employer has superior knowledge of a conflict between an employee's religious practice and company policies. *Id.* at 86a-87a.

While Judge Ebel concluded that the facts alleged by EEOC would, if true, support Title VII liability, he concurred with the portion of the majority opinion vacating the grant of summary judgment to EEOC, because he concluded that there were factual disputes

between the parties relevant to respondent's liability. App., *infra*, 90a-91a & n.12.

5. By an evenly divided vote among active judges, the court of appeals denied rehearing en banc. App., *infra*, 121a-133a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit erred in holding that employers cannot be liable for failure to provide religious accommodations under Title VII unless they have received explicit notice giving rise to "particularized, actual knowledge" of the conflict directly from the applicant or employee. Its decision conflicts with the decisions of at least four other courts of appeals, and threatens broad adverse consequences, particularly in situations involving applications for employment, where applicants may never learn that their religious practices conflict with job requirements and therefore require accommodation. This Court's intervention is warranted.

A. The Tenth Circuit Erred In Holding That Title VII Protects Only Employees Who Directly Provide Explicit Notice Of The Need For A Religious Accommodation

Title VII makes it unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). "Religion" is defined to include "all aspects of religious observance and practice, as well as belief" unless an employer demonstrates that accommodating the religious practice would be an undue

hardship. 42 U.S.C. 2000e(j). By their plain terms, these provisions together make it unlawful for an employer to discriminate against any job applicant based on the applicant's religious practice, absent a showing of undue hardship. The holding of the court of appeals is incompatible with this text because it permits employers to deliberately "fail or refuse to hire" applicants, 42 U.S.C. 2000e-2(a)(1), based on what the employer understands correctly to be "aspects of religious observance and practice," 42 U.S.C. 2000e(j). The statute's text provides no foothold for the additional requirement that an employer's understanding that a practice reflects religious beliefs must come from explicit statements of the applicant herself.

The court of appeals' carve-out from Title VII protections is likewise incompatible with the statute's objectives. Title VII accommodates both religious observance and business imperatives by requiring "bilateral cooperation" to achieve "an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted); see also *ibid.* (discussing legislative history supporting this view). The court of appeals' rule undermines Title VII's framework. Employers who conclude that an applicant may have a religious conflict based on information other than direct, explicit notice from the applicant have no incentive to begin a process of cooperative "reconciliation of the needs," *ibid.*, with the additional obligations that process may entail. Employers may simply find it easier not to hire the observant applicant—a result that Title VII sought to avoid.

The court of appeals appeared to conclude that its result would not undermine Title VII's protections for religious practices because applicants and employees inevitably have superior knowledge of their religious beliefs and are therefore best positioned to raise any conflict. See App., *infra*, 46a-53a. But knowledge of the need for an accommodation requires an understanding not simply of an applicant's or employee's religious beliefs but also of company policies—an area where an employer's knowledge is generally superior. Here, for instance, Elauf never requested an accommodation because she was unaware that her headscarf would conflict with company policy. See *id.* at 75a-76a. The court of appeals' holding thus permits employers to take adverse employment actions based on what they correctly understand to be religious practices in cases in which applicants or employees simply lack the knowledge necessary to request an accommodation.

The court of appeals' decision will lead to irrational results in other cases as well, by foreclosing Title VII's protections when the statements of employees— who may be unsophisticated or may simply be unaware of the magic words the Tenth Circuit now requires— would be adequate to put any reasonable person on notice of the need for an accommodation, but fall short of the direct and explicit standard that the court of appeals has imposed. See, *e.g.*, *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (Jewish employee requesting time off for wife's religious conversion ceremony but not explicitly stating that attendance was a religious obligation); *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010) (Christian employees refusing to comply with policy barring display of

religious art but not stating that their refusal reflects perceived religious obligations and requires accommodation).

The court of appeals' additional concerns do not justify the gap that the court would create in Title VII protections. The court suggested that an explicit, direct notice requirement is required because EEOC discourages employers from inquiring as to job applicants' religious beliefs in the first instance or from engaging in religious stereotyping, noting that either conduct could suggest that an employer was discriminating in employment decisions on the basis of religion. App., *infra*, 55a-56a. But after an employer has in fact received sufficient information about an applicant's or employee's beliefs to be on notice of a religious conflict, or (as here) where the employer assumes correctly the existence of such a conflict, EEOC does not discourage employers from making inquiries necessary to confirm the need for an accommodation. See *EEOC Compliance Manual, Section 12: Religious Discrimination* 12-I-A-3, 12-IV-A-2, Examples 30 and 31 (2008) (*Compliance Manual*). And in any case, employers can obtain the needed information simply by advising an applicant of a work rule and inquiring as to whether (and why) the applicant would have difficulty complying. See generally EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace*, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited July 24, 2014); *Compliance Manual* 12-IV(A). Accordingly, the court of appeals' concern about the prospect of routine inquiry into religious faith does not justify its holding.

B. The Tenth Circuit's Decision Creates A Split With Four Other Courts of Appeals

As both the majority and dissent recognized, the court of appeals' decision creates a conflict among the circuits regarding the notice that an employer must have in order to be obligated to consider an accommodation for a religious practice. App., *infra*, 46a; see also *id.* at 87a (Ebel, J., concurring in part and dissenting in part). The court of appeals' holding that an employer is free to take action against an employee or applicant based on the person's religious practices, unless the person has directly "informed the employer that the [employee or applicant] adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice," *id.* at 28a, squarely conflicts with the approaches of four circuits that have rejected an explicit notice rule. Those courts simply require that an employer have "enough information about an employee's religious needs" from any source "to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996); *Heller*, 8 F.3d at 1439; *Dixon*, 627 F.3d at 856; see also *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013) (applying same principle).

1. The Seventh, Eighth, Ninth, and Eleventh Circuits have each expressly rejected the explicit notice requirement adopted by the court of appeals in this case. In *Heller*, for example, a Jewish employee was fired for missing work to attend his wife's conversion ceremony. 8 F.3d at 1439. While the employee had

asked to attend the ceremony, the employer argued that "because Heller never explained the nature of the ceremony to [the employer], he did not give notice of his conflict." *Ibid.* The Ninth Circuit disagreed that any such explanation was required, explaining that "[a] sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Ibid.*

Sitting en banc, the Eighth Circuit adopted the same formulation. See *Brown*, 61 F.3d at 654. In *Brown*, an employee was reprimanded for engaging in religious activities at work, such as referring to Bible passages and using office space for group prayers. He was fired based in part on the reprimand. The court of appeals rejected the employer's defense that it had not received adequate notice of a conflict requiring accommodation, concluding that Title VII required that "[a]n employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'" *Ibid.* (quoting *Heller*, 8 F.3d at 1439). The court rejected an explicit-notice alternative. *Ibid.* ("reject[ing] the defendants' argument that because Mr. Brown never explicitly asked for accommodation for his religious activities, he may not claim the protections of Title VII"). Further, the court found notice established because the employer's conduct demonstrated that it was aware of a religious conflict, explaining that the employer's having issued a reprimand that "related directly to religious activities

by Mr. Brown" established that the employer was "well aware of the potential for conflict between [its] expectations and Mr. Brown's religious activities." *Ibid.*

The Eleventh Circuit similarly rejected an express notice requirement and found notice established by actions that signaled an employer's awareness of a religious conflict. In *Dixon*, a couple employed by an apartment complex was fired after a confrontation surrounding their display of religious art. 627 F.3d at 853. The court of appeals rejected the explicit-notice defense raised by the employer, concluding that it was not fatal to the couple's Title VII claims that they "never expressly told [their supervisor] that they did not want to take down their artwork because they opposed efforts to remove God from public places." *Id.* at 856. The court quoted approvingly the standard in *Brown* and *Heller* that "[a]n employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'" *Ibid.* And, like the Eighth Circuit, it found this notice requirement satisfied by conduct showing that the employer had in fact received enough information to be aware of a conflict. In particular, the court concluded that if a jury accepted that a supervisor told one of the plaintiffs "he was 'too religious' when she fired him," the jury could find the notice requirement satisfied because the jury "could reasonably infer that [the supervisor] connected the [plaintiffs'] failure to remove the artwork with their religious beliefs." *Id.* at 855-856.

Most recently, the Seventh Circuit rejected an explicit notice requirement in *Adeyeye*, *supra*. The employee in that case had been fired because he missed work to attend his father's funeral ceremonies in Nigeria. In requesting a leave of absence, the employee had referred to the ceremony he would attend as a "funeral rite," mentioned animal sacrifice, and stated that there was a spiritual need for his presence, but he had made no direct references to religion. 721 F.3d at 450-451. The district court held on summary judgment that the plaintiff had not provided the employer with sufficient "notice of the religious nature of the request." *Id.* at 447. The Seventh Circuit reversed, holding that "Title VII has not been interpreted to require adherence to a rigid script to satisfy the notice requirement." *Id.* at 450. The court stated that an employee was required to give only "fair notice" of the need for an accommodation and indicated—like the other courts of appeals—that an employer would be charged with reasonable inferences from the employee's request. *Id.* at 449-450. In particular, the court explained, while an employer was free to seek to clarify an ambiguous request, "an 'employer cannot shield itself from liability by intentionally remaining in the dark'" regarding a person's need for reasonable accommodation. *Id.* at 450 (citation omitted).

2. Under the standards applied by other courts of appeals, respondent would not have been entitled to summary judgment, because viewing the facts in the light most favorable to EEOC, respondent's own actions demonstrated that it had "enough information about [Elauf's] religious needs to permit [it] to understand the existence of a conflict between [her] reli-

gious practice and [its] job requirements." *Brown*, 61 F.3d at 654. The undisputed facts showed that Elauf wore a hijab to her job interview and that the assistant manager who interviewed Elauf had also seen Elauf wearing a headscarf on other occasions. See App., *infra*, 7a. Most critically, the assistant manager explained in a deposition that she did infer from observing this practice that Elauf was a Muslim who wore a headscarf for religious reasons and that she was instructed not to hire Elauf based on her headscarf even if the headscarf reflected a religious practice. *Id.* at 7a-9a (noting that Heather Cooke "assumed that [Elauf] was Muslim"; "figured that was the religious reason why she wore her head scarf"; and told Johnson of Elauf's religious requirements); see also *id.* at 99a-100a. Indeed, the company's decision not to hire Elauf because of her headscarf plainly reflected the understanding that the headscarf was not a fashion choice but a mandatory commitment, such that Elauf would not be able to adhere to respondent's Look Policy if hired. See *id.* at 9a (explaining that supervisor directed that Elauf not be hired because "she wore a headscarf—a clothing item that was inconsistent with the Look Policy").

Other circuits have made clear that this showing that an employer did in fact infer the existence of a religious conflict demonstrates that the employer had "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practice and the employer's job requirements." See *Brown*, 61 F.3d at 654. Thus, *Dixon* reasoned that a jury could find notice based on evidence that a super-

visor's statements showed the supervisor was "aware of the tension between her order and the [plaintiffs'] religious beliefs." 627 F.3d at 855-856. And *Brown* found notice established because an employer's reprimand concerning religious activities showed "that the defendants were well aware of the potential for conflict between their expectations and [the plaintiff's] religious activities." 61 F.3d at 654.

The court below misunderstands these cases in suggesting that they required "particularized, actual knowledge," see App., *infra*, 36a-40a, beyond that established by an employer's having correctly inferred a religious conflict from an applicant's appearance or behavior, see *id.* at 39a-40a. The "particularized, actual knowledge" requirement that the decision below sets out is nowhere articulated in the opinions of other courts. To the contrary, as noted above, the courts that have found notice based on employers' awareness of a conflict simply relied on evidence—like that present in this case—that the employers believed a conflict existed. See *Dixon*, 627 F.3d at 855-856 (statements when firing plaintiffs); *Brown*, 61 F.3d at 654 (statements in reprimand letter). If anything, the evidence presented in this case is stronger, because in addition to evidence drawn from respondent's treatment of Elauf, the record includes testimony in which the assistant manager who interviewed Elauf directly stated that she believed Elauf had a religious conflict that would require accommodation. See App., *infra*, 8a, 99a-100a.

Nor is the court of appeals correct that *Adeyeye* and *Heller* each required "particularized, actual knowledge." App., *infra*, 36a. Far from adopting such

a standard, each of those decisions suggested that an employer could be on notice of a conflict even if the employer failed to grasp the need for an accommodation at all, so long as a reasonable person would have understood the conflict. See *Adeyeye*, 721 F.3d at 450 (stating that "[t]he employer * * * must be alert enough to grasp that the request [for an accommodation] is religious in nature" and that "an 'employer cannot shield itself from liability by intentionally remaining in the dark"); *Heller*, 8 F.3d at 1439 (test based on employer's receiving adequate information to "to *permit* the employer to understand the existence of a conflict") (emphasis added). Because the record below demonstrated that respondent's hiring personnel correctly understood Elauf's religious practice to conflict with its work rules, respondent would not be entitled to summary judgment in other courts.

3. This case is a particularly good vehicle to address the conflict among the courts of appeals because of the unusually clear factual record. Unlike in many cases involving hiring decisions, there is no dispute in this case that the applicant was not hired solely because of a religious practice—that is, there is no question that Elauf was not hired because respondent concluded that her practice of wearing a hijab would make it impossible for her to comply with respondent's Look Policy. The absence of extraneous factual disputes ensures that the Court will be able to reach the legal dispute presented concerning notice under Title VII.

C. This Case Presents A Question Of Exceptional Importance

The standard adopted by the court of appeals will affect Title VII protections in a large number of cases.

The significant—and growing—number of religious discrimination complaints received each year by EEOC indicates that the standards that courts set for religious discrimination claims affect a large number of real-world disputes. See EEOC, *Religion-Based Charges FY 1997-FY 2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm (last visited July 24, 2014) (noting that EEOC received 3721 religious discrimination complaints in most recent fiscal year). And published cases establish that the court of appeals' requirement that a Title VII claimant must have directly "informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice," App., *infra*, 28a, will affect a large number of the accommodation cases that arise, because employees without legal training often make requests that fall short of this standard. See, *e.g.*, *Heller*, 8 F.3d at 1439; *Dixon*, 627 F.3d at 856; *Adeyeye*, 721 F.3d at 450-451.

The court of appeals' ruling will have a particularly significant impact in the frequently arising cases involving job applicants whose religions impose requirements concerning grooming or dress.[2] Employ-

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[2] Among the recent Title VII cases brought by EEOC to challenge employers' failure to accommodate religious practices concerning grooming or attire are *EEOC* v. *Morningside House of Ellicott City, LLC*, No. 11-2766 (D. Md.); *EEOC* v. *Shadescrest Healthcare Ctr.*, No. 14-1253 (N.D. Ala.); *EEOC* v. *Abercrombie & Fitch Stores*, No. 10-3911 (N.D. Cal.); *EEOC* v. *Kaze Japanese Steakhouse*, No. 10-358 (E.D.N.C.); *EEOC* v *LAZ Parking, LLC*, No. 10-1384 (N.D. Ga.); *EEOC* v. *Ivy Hall Assisted Living, LLC*, No. 08-3067 (N.D. Ga.); *EEOC* v. *White Lodging Servs. Corp.*, No. 06-353 (W.D. Ky.); *EEOC* v. *Regency Health Assocs.*, No. 05-2519

ers with dress codes who interview such applicants will often be able to foresee a possible religious conflict based on an applicant's presentation in the interview—just as respondent did here. And, as in this case, such employers will frequently have knowledge superior to that of applicants concerning whether the grooming or attire at issue would conflict with a company policy. By permitting employers to decline to hire applicants in these cases based on what they accurately perceive to be religious practices, without initiating a dialogue or even advising applicants of the conflicting policy, the court of appeals undercuts the protection of religious practices in an important and frequently arising context.

(N.D. Ga.); *EEOC* v. *Autozone, Inc.*, No. 10-11648 (D. Mass.); and *EEOC* v. *Tri County Lexus*, No. 10-4987 (D. N.J.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
IAN HEATH GERSHENGORN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
JENNIFER S. GOLDSTEIN
Acting Assistant General Counsel
JAMES M. TUCKER
Attorney
U.S. Equal Employment Opportunity Commission

JULY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-5110

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS,
DEFENDANT-APPELLANT

Filed: Oct. 1, 2013

OPINION

Before: KELLY, EBEL, and HOLMES, Circuit Judges.

HOLMES, Circuit Judge.

Abercrombie & Fitch ("Abercrombie") appeals from the district court's grant of summary judgment in favor of the Equal Employment Opportunity Commission ("EEOC") and the court's denial of summary judgment in favor of Abercrombie, on the EEOC's claim that Abercrombie failed to provide a reasonable religious accommodation for a prospective employee, Samantha Elauf, in contravention of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's grant of summary judgment

to the EEOC. Abercrombie is entitled to summary judgment as a matter of law because there is no genuine dispute of material fact that Ms. Elauf never informed Abercrombie prior to its hiring decision that she wore her headscarf or "hijab"[1] for religious reasons and that she needed an accommodation for that practice, due to a conflict between the practice and Abercrombie's clothing policy. Accordingly, we remand the case to the district court with instructions to vacate its judgment and enter judgment in favor of Abercrombie, and for further proceedings consistent with this opinion.

I

A

Abercrombie is a retail clothing company that operates stores across the United States under a variety of brand names, including Abercrombie & Fitch, abercrombie ("Abercrombie Kids"), and Hollister. Abercrombie requires employees in its stores to comply with a "Look Policy."[2] That policy is intended to promote and showcase the Abercrombie brand, which

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[1] A leading scholar of Islam, who was the EEOC's expert in this case, John L. Esposito, Ph.D., has defined a "hijab" as the "veil or head covering worn by Muslim women in public." John L. Esposito, *Islam: The Straight Path* 310 (4th ed. 2011). In their briefing, the parties use the terms "headscarf" and "hijab" interchangeably, and so do we.

[2] Our inquiry is focused on the Look Policy as it was set forth in the Store Associate Handbook (revised Sept. 2006). This was the policy applicable in 2008 when the events relevant here took place. Consequently, we do not consider any changes that Abercrombie may have made to the Look Policy since then.

"exemplifies a classic East Coast collegiate style of clothing." Aplt. Opening Br. at 5. The Look Policy applies to every Abercrombie employee. Under the circumstances of this case, however, our central concern is the policy's application to sales floor employees, whom Abercrombie referred to as "Model[s]." Aplt. App. at 372 (Dep. of Chad Moorefield, taken Mar. 16, 2011). Employees must dress in clothing that is consistent with the kinds of clothing that Abercrombie sells in its stores. Notably, the policy prohibits employees from wearing black clothing and "caps," although the policy does not explicate the meaning of the term "cap." Aplee. Supp. App. at 69 (Abercrombie Store Associate Handbook, dated Sept. 2006). An employee is subject to "disciplinary action up to and including termination" for failure to comply with the Look Policy. *Id.*

Abercrombie contends that its Look Policy is critical to the health and vitality of its "preppy" and "casual" brand. *See* Aplt. Opening Br. at 5 (quoting Aplt. App. at 375; *id.* at 63 (Dep. of Kalen McJilton, taken Jan. 20, 2011)) (internal quotation marks omitted). This is so, Abercrombie maintains, because it does very little advertising through traditional media outlets (e.g., print publications or television); instead, it relies on its in-store experience to promote its products. Consequently, Abercrombie expends a great deal of effort to ensure that its target customers receive a holistically brand-based, sensory experience. *See, e.g.*, Aplt. App. at 70 (Dep. of Deon Riley, taken Mar. 17, 2011) ("Abercrombie has made a name because of the brand. It's a fact that you walk into an environment, and it's not just the smell or the sound,

it's the way the merchandise is set up. It's the lighting. Most of all, it's the stylish clothing. "). The "main part" of a Model's job is to "represent [Abercrombie's] clothing[,] first and foremost." *Id.* at 376. To Abercrombie, a Model who violates the Look Policy by wearing inconsistent clothing "inaccurately represents the brand, causes consumer confusion, fails to perform an essential function of the position, and ultimately damages the brand." Aplt. Opening Br. at 8.

The interviewing process plays an important role in furthering Abercrombie's objective of ensuring that employees adhere to its Look Policy. Managers assess applicants on appearance and style during the interview. They are supposed to inform applicants of various aspects of the job, including the Look Policy. New Models typically receive a copy of the policy in an employee handbook and sign an acknowledgment that they have received it, when they start work.

Abercrombie instructs its store managers not to assume facts about prospective employees in job interviews and, significantly, not to ask applicants about their religion. If a question arises during the interview regarding application of the Look Policy, or if a prospective employee requests a deviation from the policy (for example, based on an inflexible religious practice), the store manager is instructed to contact Abercrombie's corporate human resources department ("HR"), or his or her direct supervisor. HR managers may grant accommodations if doing so would not harm the brand.

B

Samantha Elauf claims to be a practicing Muslim.[3] In mid-2008, Ms. Elauf, then seventeen-years old, applied for a Model position at the Abercrombie Kids store in the Woodland Hills Mall in Tulsa, Oklahoma. She had previously purchased and worn Abercrombie clothes.

Prior to her interview, Ms. Elauf discussed with a friend who worked at Abercrombie's Woodland Hills location, Farisa Sepahvand, whether wearing a hijab to work would be permissible. Ms. Elauf has worn a hijab since she was thirteen and testified that she does so for religious reasons. The Quran—the "sacred scripture" of the Islamic faith, Aplee. Supp. App. at 5 (Dep. of John L. Esposito, taken Feb. 22, 2011)—counsels women to protect their modesty, and some religious scholars "believe that the Qu[]ran does require an hijab" to be worn by Muslim women, "but there are many who disagree with that interpretation," *id.* at 2. As the EEOC's expert, Dr. Esposito, testified, although some Muslim women wear hijabs for religious reasons, those are not the only reasons that Muslim women wear hijabs; for example, some do so for cultural reasons or in order to demonstrate a personal rejection of certain aspects of Western-style dress.[4] Dr. Esposito testified that, in understanding

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[3] The parties dispute whether Ms. Elauf possesses a bona fide, sincerely held religious belief in Islam. This dispute, however, is not material to our resolution of this case; therefore, we need not (and do not) address it.

[4] Relevant to this point, in his scholarly writing, Dr. Esposito observes:

the reasons why people maintain certain styles of dress, "it really is, the question is, what is their motivation." Aplt. App. at 292; *see id.* at 472 (noting, as to why a hijab is worn, "it really depends on the woman").

In responding to Ms. Elauf's inquiry about wearing a headscarf, Ms. Sepahvand testified that she had raised the issue with assistant manager Kalen McJilton, who knew Ms. Elauf from her prior visits to the store. Noting that he had previously worked at Abercrombie with someone who wore a white yarmulke, Mr. McJilton suggested that he did not see any problem with Ms. Elauf wearing a headscarf, "especially if she didn't wear a headscarf that was black." Aplee. Supp. App. at 181 (Dep. of Farisa Sepahvand, taken Mar. 31, 2011) (internal quotation marks omitted). Ms. Sepahvand then communicated to Ms. Elauf that, although a headscarf would be permitted, because of Abercrombie's no-black-clothing policy, she would not

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> The religious situation of American Muslims can be especially difficult for the younger generation. Many have parents, raised in overseas Muslim societies, who *equate cultural practices and norms with the principles of Islam.* Their children face the challenge of both fitting into American societies and retaining their Islamic identity, of *distinguishing between what is mandated by religion and the "foreign" cultural baggage of their parents.*

Esposito, *supra*, at 291 (emphases added); *cf. id.* at 74 ("Yet [Muslims] continue to face issues of identity and faith as a religious minority. As with many other religious and ethnic groups that preceded them, Muslim communities face issues of assimilation or integration, diversity, and pluralism.").

be able to wear a black one. Ms. Elauf seemed agreeable to that restriction.

Ms. Elauf met with assistant manager Heather Cooke to interview for the Model position. Ms. Cooke was already familiar with Ms. Elauf, having observed her in the Abercrombie store chatting with Ms. Sepahvand and working elsewhere in the Woodland Hills Mall. Ms. Cooke had seen Ms. Elauf wearing a headscarf prior to the interview. Ms. Cooke "did not know" Ms. Elauf's religion, but she "assumed that she was Muslim," Aplt. App. at 365 (Dep. of Heather Cooke, taken Jan. 19, 2011), and "figured that was the religious reason why she wore her head scarf," Aplee. Supp. App. at 48. In the interview, Ms. Cooke did not ask Ms. Elauf if she was a Muslim.

Ms. Elauf was familiar with the type of clothing Abercrombie sold and knew that Models were required to wear similar clothing. During the interview, Ms. Elauf wore an Abercrombie-like T-shirt and jeans. She also wore a headscarf (i.e., hijab); it was black. According to Ms. Elauf, Ms. Cooke never mentioned the Look Policy by name but she did describe some of the dress requirements for Abercrombie employees, and informed Ms. Elauf that she would have to wear clothing similar to that sold by Abercrombie and, specifically, that she could not wear heavy makeup or nail polish.

During the course of the interview, Ms. Elauf never informed Ms. Cooke that she was Muslim, never brought up the subject of her headscarf, and never indicated that she wore the headscarf for religious reasons and that she felt obliged to do so, and thus would need an accommodation to address the conflict be-

tween her religious practice and Abercrombie's clothing policy. Indeed, the topic of her headscarf never came up one way or the other. For example, Ms. Cooke did not tell Ms. Elauf that she "wouldn't be able to wear [her headscarf] or anything like that." Aplt. App. at 55 (Dep. of Samantha Elauf, taken Jan. 4, 2011). After offering a description of the dress requirements, Ms. Cooke asked Ms. Elauf at the end of the interview if she had any questions. Ms. Elauf did not ask any.

Ms. Cooke assessed Ms. Elauf's candidacy using Abercrombie's official interview guide. The guide requires the interviewer to consider the applicant's "appearance & sense of style," whether the applicant is "outgoing & promotes diversity," and whether he or she has "sophistication & aspiration." Aplee. Supp. App. at 61 (Model Group Interview Guide, dated June 26, 2008). Each category is assessed on a three-point scale, and an applicant with a score in "appearance" of less than two, or a total combined score of five or less, is not recommended for hire. Ms. Cooke initially scored Ms. Elauf at a two in each category, for a total of six, which is a score that "meets expectations" and amounts to a "recommend[ation]" that Abercrombie hire her. *See id.* at 64.

Although Ms. Cooke believed Ms. Elauf was a good candidate for the job, she was unsure whether it would be a problem for her to wear a headscarf as an Abercrombie Model, and whether the headscarf could be black in color. Ms. Cooke ordinarily did not seek approval from a senior manager in evaluating or hiring new Models, but in this case she did.

Ms. Cooke's direct supervisor was unable to answer her question about Ms. Elauf's headscarf, so Ms. Cooke consulted with Randall Johnson, her district manager. Mr. Johnson said that Ms. Elauf should not be hired because she wore a headscarf—a clothing item that was inconsistent with the Look Policy. Notwithstanding Ms. Cooke's contrary deposition testimony, Mr. Johnson denied being told by Ms. Cooke that Ms. Elauf was a Muslim and that she wore her headscarf for religious reasons.

Ms. Cooke testified that Mr. Johnson told her to change Ms. Elauf's interview score on the appearance section from a two to a one, thereby bringing her overall score down to a five and ensuring that she would not be recommended for hire. With this understanding, Ms. Cooke threw away the original interview sheet and changed Ms. Elauf's score, thus implementing Mr. Johnson's alleged instructions. Ms. Cooke did not extend a job offer to Ms. Elauf. A few days after the interview, Ms. Elauf learned from Ms. Sepahvand that she had not been hired because of her headscarf.

C

The EEOC filed the instant action against Abercrombie on September 17, 2009, alleging violations of Title VII, on the grounds that Abercrombie "refused to hire Ms. Elauf because she wears a hijab" and "failed to accommodate her religious beliefs by making an exception to the Look Policy." Dist. Ct. Doc. No. 2, at 2 (EEOC Compl., filed Sept. 17, 2009). It sought injunctive relief, back pay, and damages.

Abercrombie disputed the EEOC's allegations and argued that Ms. Elauf failed to inform it of a conflict

between the Look Policy and her religious practices. It further argued that the proposed accommodation—allowing Ms. Elauf to wear the headscarf— would have imposed an undue hardship on the company. Furthermore, it challenged Ms. Elauf's assertion that she possessed a bona fide, sincerely held religious belief, forming the basis for her purported conflict with the Look Policy.

The parties filed cross-motions for summary judgment on issues concerning liability. In addressing the motions and the religion-accommodation claim, the district court applied the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under that framework, the court concluded that the EEOC had established a prima facie case through evidence that Ms. Elauf had a bona fide, sincerely held religious belief and a related practice that conflicts with the Look Policy. Specifically, the court found that Ms. Elauf wore her "head scarf based on her belief that the Quran requires her to do so" and "this belief conflicts with Abercrombie's prohibition against headwear." Aplt. App. at 575 (Op. & Order, filed July 13, 2011). Further, it reasoned that "Abercrombie had notice [that] she wore a head scarf because of her religious belief[,] and that it refused to hire her because the head scarf conflicted with its Look Policy." *Id.*

The district court rejected Abercrombie's argument that the notice element of the EEOC's prima facie case was not satisfied because Ms. Elauf did not personally inform Abercrombie that she wore her hijab for religious reasons and would need an accommodation for it,

because she was obliged to do so. The court reasoned that, while the Tenth Circuit had not directly addressed this issue, "[c]ourts in other circuits have held that the notice requirement is met when an employer has enough information to make it aware [that] there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." *Id.* at 580. It further stated that, "faced with the issue of whether the employee must explicitly request an accommodation or whether it is enough that the employer has notice [that] an accommodation is needed[,] the Tenth Circuit would likely opt for the latter choice." *Id.* at 581 (footnote omitted).

Applying its formulation of the notice requirement, the district court observed that "it is undisputed that Elauf wore her head scarf at the interview with assistant store manager Heather Cooke, and Cooke *knew* she wore the head scarf based on her religious belief." *Id.* (emphasis added). It added that, while a fact question may yet exist as to whether Ms. Cooke told Mr. Johnson that Ms. Elauf wore her headscarf because of her religion, that question was immaterial "because the knowledge of Cooke—who had responsibility for hiring decisions at the Abercrombie Kids store—is attributable to Abercrombie." *Id.* at 581 n.11. The district court stated that "there could be no bilateral, interactive process of accommodation because, although Abercrombie was on notice that Elauf wore a head scarf for religious reasons, it denied [her] application for employment without informing her [that] she was not being hired or telling her why." *Id.* at 582 n.12.

The district court also rejected Abercrombie's contention that, even if the EEOC had established its prima facie case, Abercrombie had demonstrated that it would suffer undue hardship. The court observed that, despite speculative testimony to the contrary, Abercrombie had provided no "studies or specific examples" to support its opinion that granting Ms. Elauf an exception "would negatively impact the brand, sales[,] and compliance [with the Look Policy]." *Id.* at 582. In that vein, it emphasized that Abercrombie had made numerous exceptions to the Look Policy over the past ten or so years—most significantly, "[e]ight or nine head scarf exceptions." *Id.* at 583.

The parties went to trial on damages. The jury awarded the EEOC $20,000 in compensatory damages. The EEOC's request for prospective injunctive relief was denied. This timely appeal followed.

II

In summary, we conclude that the district court erred in denying summary judgment to Abercrombie.[5]

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[5] While "the denial of a summary-judgment motion is ordinarily not an appealable order [in itself], it can be reviewed when 'it is coupled with a *grant* of summary judgment to the opposing party.'" *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1306 n.1 (10th Cir. 2008) (emphasis added) (quoting *Yaffe Cos. v. Great Am. Ins. Co.*, 499 F.3d 1182, 1184 (10th Cir. 2007)); *see Thom v. Am. Standard, Inc.*, 666 F.3d 968, 972-73 (6th Cir. 2012). Abercrombie moved for summary judgment before the district court on the same grounds as it raises now on appeal and the parties engaged in an exhaustive round of briefing before the district court. The record is fully developed and the issues are amenable to dispositive resolution. *See, e.g., Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 465 (7th Cir. 1997) ("The reason that appellate courts, when reversing a grant of

More specifically, we hold that, under the governing substantive law, Abercrombie is entitled to summary judgement because there is no genuine dispute of material fact regarding this key point: Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs and (because she felt religiously obliged to wear it) that she would need an accommodation for the practice, because of a conflict between it and Abercrombie's clothing policy. Furthermore, it follows ineluctably from the logic and reasoning of our decision that, in granting partial summary judgment to the EEOC, the district court erred.

A

Our review of a district court's summary judgment ruling is de novo; we "apply[] the same standard as the district court." *Helm v. Kansas*, 656 F.3d 1277, 1284 (10th Cir. 2011). "[S]ummary judgment is appropriate 'if the movant shows that there is no genuine dispute

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summary judgment, typically do not direct the district court to enter summary judgment in favor of the appellant is because a genuine issue of material fact remains. But, in instances in which the facts and law establish that the appellant is entitled to judgment as a matter of law, we are free to direct the district court to enter judgment in appellant's favor." (quoting *Swaback v. Am. Info. Techs. Corp.*, 103 F.3d 535, 544 (7th Cir. 1996)) (internal quotation marks omitted)); *see also McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993) ("Where we reverse a summary judgment order in favor of one party, we will review the denial of the other party's cross-motion for summary judgment under the same standards applied by the district court so long as it is clear that the party opposing the cross-motion had an opportunity to dispute the material facts.").

as to any material fact and the movant is entitled to judgment as a matter of law.'" *Morris v. City of Colo. Springs*, 666 F.3d 654, 660 (10th Cir. 2012) (quoting Fed. R. Civ. P. 56(a)). In assessing a motion for summary judgment, "[w]e view the facts, and all reasonable inferences those facts support, in the light most favorable to the nonmoving party." *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 947 (10th Cir. 2011).

Succinctly put, we must "examine the record to determine whether any genuine issue of material fact [i]s in dispute; if not, we determine [the correct application of the] substantive law , and in so doing we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1246 (10th Cir. 2010) (quoting *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998)) (internal quotation marks omitted); *see Morris*, 666 F.3d at 660; *City of Herriman v. Bell*, 590 F.3d 1176, 1180-81 (10th Cir. 2010). As pertinent here, we construe the facts in the light most favorable to the EEOC.

B

1

To properly assess Ms. Elauf's Title VII religion-accommodation claim, we must first understand the meaning that the term "religion" takes on in the Title VII context. Under Title VII it is "an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's religion."

Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1154 (10th Cir. 2000) (second omission in original) (quoting 42 U.S.C. § 2000e-2(a)(1)) (internal quotation marks omitted). "The term 'religion' includes all aspects of religious observance and practice, as well as belief. " 42 U.S.C. § 2000e(j).

As the EEOC has recognized, "[r]eligion is very broadly defined under Title VII." EEOC Compliance Manual § 12-I(A) (emphasis omitted), *available at* http://www.eeoc.gov/policy/docs/religion.html; *see also Bushouse v. Local Union 2209, United Auto., Aerospace, & Agric. Implement Workers*, 164 F. Supp. 2d 1066, 1076 n.15 (N.D. Ind. 2001) (noting that Title VII has a "broad definition of 'religious belief'"). "Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others." EEOC Compliance Manual § 12-I(A)(1). However, while recognizing a broad concept of religion, the EEOC acknowledges that the substantive content of religious beliefs is distinctive:

> Religious beliefs include theistic beliefs as well as non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are

> strongly held. Rather, *religion typically concerns ultimate ideas about life, purpose, and death.*

Id. (footnotes omitted) (emphasis added) (quoting 29 C.F.R. § 1605.1 (internal quotation marks omitted); *United States v. Meyers*, 906 F. Supp. 1494, 1502 (D. Wyo. 1995) (internal quotation marks omitted), *aff'd*, 95 F.3d 1475 (10th Cir. 1996)); *see also* 3 Lex K. Larson, *Employment Discrimination* § 54.05[4], at 54-13 (2d ed. 2013) ("[A] definition of religion often invoked by the courts is a belief based on a theory of 'man's nature or his place in the Universe' or a belief that 'relates to a Supreme Being.'"). Consequently, "[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII." EEOC Compliance Manual § 12-I(A)(1).

In the EEOC's view, religion is a uniquely personal and individual matter. This view was shaped in no small part by how courts have defined religion for purposes of the First Amendment and other related contexts. *See id.* at § 12-I(A) nn.18-28 and accompanying text (relying heavily on case law from the First Amendment and other contexts to define "religion" for Title VII's purposes); *see also* 29 C.F.R. § 1605.1 (setting forth the EEOC's definition of "religious practices" and noting that it is in accordance with the standard developed by the Supreme Court in *United States v. Seeger*, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965), and *Welsh v. United States*, 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970)); *cf. EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002)

(relying on First Amendment jurisprudence to define "religion" for purposes of Title VII); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) (relying on *Seeger* and *Welsh* to interpret "religious" for purposes of Title VII).

In these First Amendment-related contexts, courts consistently focus on the *individual's* belief system rather than the beliefs of a religious group with which the individual may (or may not) be associated. *See Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834, 109 S. Ct. 1514, 103 L. Ed. 2d 914 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); [*Eddie*] *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Seeger*, 380 U.S. at 173, 185, 85 S. Ct. 850 (interpreting the phrase "religious training and belief" in a conscientious-objection statute to require courts "to decide whether the beliefs professed by a registrant are, *in his own scheme of things*, religious" (emphasis added)); *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (holding that a Seventh Day Adventist prisoner's religious belief that he must adhere to a vegetarian diet, if sincerely held, was entitled to protection under the First Amendment

even though the district court found that not all Seventh Day Adventists are vegetarian and that the "faith does not *require*" such a diet); *see also* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1235 (4th ed. 2011) ("[R]eligion is inherently personal and an individual might have a sincere religious belief that departs from the dogma of his or her religion. In fact, for this reason, the [Supreme] Court has said [in the First Amendment context] that the dominant views in a faith are not determinative in assessing whether a particular belief is religious.").

Apparently guided by such authorities, the EEOC's Compliance Manual notes:

> [A] person's religious beliefs need not be confined in either source or content to traditional or parochial concepts of religion. A belief is religious for Title VII purposes if it is religious in *the person's own scheme of things, i.e.*, it is a sincere and meaningful belief that occupies *in the life of its possessor* a place parallel to that filled by God. An employee's belief or practice can be religious under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or *if few—or no—other people adhere to it.*

EEOC Compliance Manual § 12-I(A)(1) (omission in original) (emphases added) (footnotes omitted) (quoting [*Eddie*] *Thomas*, 450 U.S. at 716, 101 S. Ct. 1425 (internal quotation marks omitted); *Redmond*, 574 F.2d at 901 n.12 (internal quotation marks omitted); *Seeger*, 380 U.S. at 176, 85 S. Ct. 850 (internal quotation marks omitted)); *see also* EEOC, *Questions and*

Answers: Religious Discrimination in the Workplace [hereinafter *EEOC Q & A*], *available at* http://www.eeoc.gov/policy/docs/qanda_religion.html ("An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion."). Therefore, determining "[w]hether a practice is religious depends on *the employee's motivation*. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons."[6] EEOC Compliance Manual § 12-I(A)(1) (emphasis added). Indeed, the EEOC recognizes that the motivation of employees may change over time; they may engage in a practice for religious reasons during one phase of their lives and for secular reasons during another. *See EEOC Q & A*, *supra* ("[A]n individual's beliefs—or degree of adherence—may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.").

These general principles have significant implications for the enforcement of Title VII's proscription against religious discrimination. A couple of points are worth underscoring. First, an applicant or employee

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[6] The EEOC Compliance Manual, citing our decision in *LaFevers*, provides the following example: "[O]ne employee might observe certain dietary restrictions for religious reasons while another employee adheres to the very same dietary restrictions but for secular (*e.g.*, health or environmental) reasons." EEOC Compliance Manual § 12-I(A)(1); *cf. LaFevers*, 936 F.2d at 1119 (recognizing that a Seventh Day Adventist can have a sincere religious belief that he must adhere to a vegetarian diet even though other Seventh Day Adventists do not feel similarly obligated).

may engage in practices that are associated with a particular religion, but do so for cultural or other reasons that are not grounded in that religion. *Cf.* Larson, *supra*, § 54.04, at 54-7 (noting that "one person's political view may well be another's religious conviction"). If so, an employer's discrimination against that individual for engaging in that practice—though possibly reprehensible and worthy of condemnation—would not contravene Title VII's religion-discrimination provisions. That is true of course because, despite the practice's customary association with religion, the applicant's or employee's motivation for engaging in the practice would not be religious.

Second, because religious beliefs have a distinctive content related to ultimate ideas about life, purpose, and death, logically, even if an applicant or employee claims to be acting for "religious" reasons, if those reasons actually do not pertain to such ultimate ideas, then that person's conduct would fall outside the protective ambit of Title VII—*viz.*, the conduct would not truly relate to religious matters. *See* EEOC Compliance Manual § 12-I(A)(1), Ex. 6. ("Personal Preference That is Not a Religious Belief");[7] *see also Reed v.*

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[7] The EEOC has offered the following relevant example:

Sylvia wears several tattoos and has recently had her nose and eyebrows pierced. A newly hired manager implements a dress code that requires that employees have no visible piercings or tattoos. Sylvia says that her tattoos and piercings are religious because they reflect her belief in body art as self-expression and should be accommodated. However, the evidence demonstrates that her tattoos and piercings are not related to any religious belief system. For example, they do not function as a symbol of any religious belief, and do not relate to any "ultimate

Great Lakes Cos., 330 F.3d 931, 935 (7th Cir. 2003) ("[A]n employee is not permitted to redefine a purely personal preference or aversion as a religious belief."); *Vetter v. Farmland Indus., Inc.*, 120 F.3d 749, 751 (8th Cir. 1997) ("An employer need not accommodate a purely personal preference. " (internal quotation marks omitted)); *cf. Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (discussing in the free exercise context the necessity of distinguishing between choices that are "philosophical and personal rather than [ones that are] religious"); *United States v. Meyers*, 95 F.3d 1475, 1483-84 (10th Cir. 1996) (determining, for purposes of the Religious Freedom Restoration Act, whether a belief qualifies as a "religious belief" by assessing, *inter alia*, whether the belief "address[es] fundamental questions about life, purpose, and death"); *id.* at 1484 (agreeing with the district court's conclusion that the defendant's beliefs were not religious in nature despite their being "deeply [held]" and "sincere[]" because they were "derived entirely from his secular beliefs," and collecting cases).

2

The EEOC has presented a religion-discrimination claim based upon Abercrombie's alleged failure to accommodate Ms. Elauf's conflicting religious practice of wearing a hijab. Title VII's implementing regulations

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concerns" such as life, purpose, death, humanity's place in the universe, or right and wrong, and they are not part of a moral or ethical belief system. Therefore, her belief is a personal preference that is not religious in nature.

EEOC Compliance Manual § 12-I(A)(1), Ex. 6.

"impose[] an obligation on the employer 'to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.'" *Thomas*, 225 F.3d at 1155 (quoting 29 C.F.R. § 1605.2(b)(1), (2)); *accord* 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1); *see Trans World Airlines v. Hardison*, 432 U.S. 63, 74, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977) ("The intent and effect of [Title VII's] definition [of 'religion'] was to make it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."); *see also Sanchez-Rodriguez v. AT & T Mobility P.R., Inc.*, 673 F.3d 1, 8 (1st Cir. 2012); *Walden v. Ctrs. for Disease Control and Prevention*, 669 F.3d 1277, 1292-93 (11th Cir. 2012) (Seymour, J., sitting by designation).

Religion-accommodation claims are a subset of the types of religion-discrimination claims that an applicant or employee may present under Title VII. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004) ("A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate."); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1018 (4th Cir. 1996) ("[A]n employee is not limited to the disparate treatment theory to establish a discrimination claim. An employee can also bring suit based on the theory that the employer discriminated against her by failing to accommodate her religious conduct." (emphasis omitted)); *see also EEOC Q & A*, *supra* (describing the kinds of religious discrimination

that "Title VII prohibits"). The EEOC has described the specific nature of the claim as follows:

> A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally. An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion. The accommodation requirement is "plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions. "

EEOC Compliance Manual § 12-IV (quoting *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3d Cir. 1986)).

The reasonable-accommodation principle is implicated only when there is a *conflict* between an employee's religious practice and the employer's neutral policy; only then does a need to accommodate arise. *See id.* § 12-IV(A)(1) (noting the need for the employer to be on notice "both of the need for accommodation and that [the accommodation] is being requested *due to a conflict between religion and work*" (emphasis added)). For there actually to be a conflict, logic dictates that an applicant or employee must consider the religious practice to be an inflexible one—that is, a practice that is required by his or her religious belief system.

It is only in such a situation that applicants or employees would be placed in the position that Title VII was designed to protect them from—the spot where they must choose between their religious convictions

and their job. *See Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682-83 (9th Cir. 1998) (granting summary judgment to the employer on the employee's Title VII religion-accommodation claim because there was no "conflict between [the employee's] religious belief and employment duties" since her religious belief, as she described it, only required her to go on a pilgrimage "at some time" rather than at the specific time she preferred to go); *cf. Reed*, 330 F.3d at 935 (holding that the employee failed to make a prima facie showing on his Title VII religion-accommodation claim because, *inter alia*, he "refuse[d] to indicate at what points [his] faith intersect[ed] the requirements of his job"). In other words, even if applicants or employees engage in a practice for religious reasons, so long as they do not feel obliged to adhere to the practice (that is, do not consider the practice to be inflexible), then there is no actual conflict, nor a consequent need for the employer to provide a reasonable accommodation. *Cf. Turner v. Boy Scouts of Am., Inc.*, No. CIV-09-180-C, 2009 WL 2567962, at *2 (W.D. Okla. Aug. 17, 2009) ("[A]lthough Plaintiff informed [his employer] he was meeting with his pastor, there is no evidence in the record suggesting that Plaintiff informed [his employer] that his religious beliefs *required a meeting* with his pastor at that time or that the meeting was anything other than a personal preference." (emphasis added)).

Notably, however, the EEOC discourages employers from making inquiries in the first instance regarding the religious beliefs or practices of applicants (and presumably employees) because "an applicant's religious affiliation or beliefs are generally viewed

as non job-related and problematic under federal law." EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs* [hereinafter *EEOC Pre-Employment Inquiries*], *available at* http://www.eeoc.gov/laws/practices/inquiries_religious.cfm; *see also Prise v. Alderwoods Grp., Inc.*, 657 F. Supp. 2d 564, 597 (W.D. Pa. 2009) (noting that questioning applicants concerning their religious beliefs could, "under some circumstances, permit an inference to be drawn that an employer engaged in improper religion-based discrimination"); EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace* [hereinafter *EEOC Best Practices*], *available at* http://www.eeoc.gov/policy/docs/bestpractices_religion.html ("In conducting job interviews, employers can ensure nondiscriminatory treatment by inquiring about matters directly related to the position in question."). Furthermore, in the religion-accommodation context, the EEOC has specifically cautioned employers to "avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate." *EEOC Best Practices, supra; see id.* (noting that "[m]anagers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices").

Thus, it is only *after* an employer is put on notice of the need for a religious accommodation that the EEOC's policy materials encourage it to actively engage in a dialogue with applicants or employees concerning their conflicting religious practice and possible accommodations that the employer might provide for it. *Cf.* Larson, *supra*, § 56.05, at 56-21 ("Indeed, it would seem unreasonable to require an employer to

accommodate the religious practices of an employee when the employer is *unaware* of the *need* to do so." (emphases added)). In this regard, the EEOC has counseled: "Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether an accommodation is available that would eliminate the religious conflict without posing an undue hardship on the operation of the employer's business." EEOC Compliance Manual § 12-IV(A)(2); *see Thomas*, 225 F.3d at 1155 (noting that religious accommodation "involves an interactive process that requires participation by both the employer and the employee"); *EEOC Q & A*, *supra* (commenting that "once on notice that a religious accommodation is needed" an employer is obliged under Title VII "to reasonably accommodate an employee"); *EEOC Best Practices*, *supra* (noting among "[e]mployer [b]est [p]ractices" that "[m]anagers and supervisors should be trained to consider alternative[,] available accommodations if the particular accommodation *requested* would pose an undue hardship" (emphasis added)); *see also EEOC Q & A*, *supra* ("[I]f the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation.").

3

In religion-accommodation cases, we apply a version of *McDonnell Douglas*'s burden-shifting ap-

proach. *See Thomas*, 225 F.3d at 1155; *see also Dixon v. Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2010). Specifically, to survive summary judgment on such a claim, "the employee initially bears the burden of production with respect to a prima facie case." *Thomas*, 225 F.3d at 1155. The prima facie case requires the employee to "show that (1) he or she had a bona fide religious belief that conflicts with an employment requirement; (2) he or she *informed his or her employer of this belief*; and (3) he or she was fired [or not hired] for failure to comply with the conflicting employment requirement." *Id.* (emphasis added); *accord Dixon*, 627 F.3d at 855.

If the employee makes out a prima facie case, "[t]he burden then shifts to the employer to (1) conclusively rebut one or more elements of the prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable reasonably to accommodate the employee's religious needs without undue hardship." *Thomas*, 225 F.3d at 1156 (footnote omitted). An accommodation is not reasonable if it would require the employer "to bear more than a de minimis cost." *Trans World Airlines*, 432 U.S. at 84, 97 S. Ct. 2264; *see Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 500 (5th Cir. 2001); *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989). And, "if an employer has provided a reasonable accommodation, we need not examine whether alternative accommodations not offered would have resulted in undue hardship." *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *see Thomas*, 225 F.3d at 1156 n.7 ("The employer does

not have to demonstrate that the particular accommodation requested by the employee would result in an undue hardship.").

We conclude that Abercrombie is entitled to summary judgment because the EEOC cannot establish the second element of its prima facie case. As discussed below, under the controlling law, the EEOC cannot establish this element because there is no genuine dispute of material fact that Ms. Elauf never informed Abercrombie before its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommodation for that practice, due to a conflict between it and Abercrombie's clothing policy.

C

In reaching our conclusion that Abercrombie is entitled to summary judgment, we resolve a question vigorously contested by the parties: specifically, whether, in order to establish a prima facie case under Title VII's religion-accommodation theory, a plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule. We answer that question in the affirmative. Consequently, because Ms. Elauf did not inform Abercrombie prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the EEOC cannot establish its prima facie case.

Our conclusion naturally rests, first, on our own express articulation of the plaintiff's prima facie burden, which is bolstered by a similar linguistic formulation of that burden found in rulings of several of our sister circuits. Second, we are fortified in our conclusion because the concepts of religion and interactive accommodation—as they are given substance in the Title VII context—virtually oblige us, as a logical matter, to insist that ordinarily the applicant or employee must initially provide the employer with explicit notice of the conflicting religious practice and the need for an accommodation for it, in order to have an actionable claim for denial of such an accommodation. Third, we discern support for our conclusion in the plain terms of the EEOC's own regulatory pronouncements on the notice obligations of applicants or employees in the religion-accommodation setting. Lastly, we are bolstered in our position by the fact that our reading of the statute's notice requirement is entirely consistent with the approach toward notice that the courts have taken, for purposes of assessing an employer's duty to accommodate, in the undisputedly analogous context of disability discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213.

The EEOC has vigorously contested this possible outcome. As the district court put it, "The EEOC urges a less restrictive approach, asserting that although Abercrombie is required to have had notice that Elauf needed an accommodation, the notice need not have been strictly in the form of Elauf verbally requesting such an accommodation." Aplt. App. at 580. More specifically, the EEOC has succinctly made the point before us: "The employer's obligation is to at-

tempt reasonable accommodation (where no undue hardship would result) when it has notice—be it from an affirmative statement by the individual, *or some other source*—of an individual's religious belief that conflicts with a work requirement." Aplee. Br. at 41 (emphasis added); *see also id.* at 32-33 ("[W]hen the facts indicate that notice of an individual's religious belief was provided by some means other than the individual affirmatively 'informing' the employer of the belief, the prima facie notice requirement should be flexibly interpreted to conform to such factual situations."). For the reasons discussed below, we are unpersuaded by the EEOC's position.

1

a

First of all, we construe our precedent (by its plain terms) as placing the burden on applicants or employees to initially inform employers of the religious nature of their conflicting practice and of the need for an accommodation. *See, e.g., Thomas*, 225 F.3d at 1155 (noting that the employee (or prospective employee) must establish that "he or she informed his or her employer of this [religious] belief" that conflicts with the employer's work requirement); *accord Toledo*, 892 F.2d at 1486.

Insofar as the plain language of our precedent leaves room for doubt on the question, construing it to require the applicant or employee to initially inform the employer of the conflicting religious practice and the need for an accommodation aligns our court with a substantial body of circuit precedent that we find persuasive. *See, e.g., Wilkerson v. New Media Tech.*

Charter Sch. Inc., 522 F.3d 315, 319 (3d Cir. 2008) (outlining a prima facie showing that obliges the employee to demonstrate that "she told the employer about the conflict" between her religious belief and the employer's work rule); *Reed*, 330 F.3d at 935 ("Title VII imposes a duty on the employer but also a reciprocal duty on the employee to give fair warning of the employment practices that will interfere with his religion and that he therefore wants waived or adjusted."); *Chalmers*, 101 F.3d at 1019 ("As [the plaintiff] recognizes, a prima facie case under the accommodation theory requires evidence that she informed her employer that her religious needs conflicted with an employment requirement and asked the employer to accommodate her religious needs."); *Johnson v. Angelica Uniform Grp., Inc.*, 762 F.2d 671, 673 (8th Cir. 1985) (noting that under the second element of the religion-accommodation prima facie case, the plaintiff must establish that "he has informed his employer about the conflict" between his religious belief and the employer's work requirement); *cf. Xodus v. Wackenhut Corp.*, 619 F.3d 683, 685 (7th Cir. 2010) (noting that the plaintiff "had to prove" during a bench trial "that he brought his religious practice to the company's attention"). And our view of the notice requirement also has been endorsed by respected secondary authority. *See* Larson, *supra*, § 55.01, at 55-3 ("One must begin with the well-known *McDonnell Douglas* description of the plaintiff's prima facie case, though, with religious discrimination, an important addition to the prima facie case is *the requirement* that the plaintiff communicate his or her bona fide religious belief to the employer." (emphasis added) (footnote

omitted)); *id.* § 56.05, at 56-21 ("Note that in establishing a prima facie case an employee is required to notify an employer of the need for accommodation.").

b

The EEOC seeks to escape the effect of our decisions in *Toledo* and *Thomas*—which, on their face, seem to require an employee (or prospective employee) to establish that "he or she informed his or her employer of this [religious] belief" that conflicts with the employer's work requirement. *Thomas*, 225 F.3d at 1155; *accord Toledo*, 892 F.2d at 1486. The EEOC maintains that these cases "did not address whether the only permissible source of the employer's awareness of the subject religious belief was the employee or applicant herself." Aplee. Br. at 36-37; *see id.* at 36 ("In *Thomas* this Court was *not* faced with the question of whether to establish a prima facie case, the plaintiff had to produce evidence that the employer's awareness of her religious belief came from her and not some other source."). The district court agreed that our precedent, and notably *Thomas*, did not resolve this notice question. *See* Aplt. App. at 580 (citing *Thomas* and noting that "the Tenth Circuit has not addressed the question of whether notice must be explicitly requested by the employee"). Even under the linguistic formulation of the second element of the prima facie case found in *Toledo* and *Thomas*, reasons the EEOC, "the critical fact is the *existence* of the notice itself, not *how* the employer came to have such notice." Aplee. Br. at 31.

As support for its broader view of the notice requirement, the EEOC relies on the Eleventh Circuit's

decision in *Dixon*, 627 F.3d 849, and the district court's decision in *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999). *See* Aplee. Br. at 30-31. The district court in the instant case reached a similar conclusion regarding the notice requirement. *See* Aplt. App. at 581 ("[F]aced with the issue of whether the employee must explicitly request an accommodation or whether it is enough that the employer has notice [that] an accommodation is needed[,] the Tenth Circuit would likely opt for the latter choice." (footnote omitted)). In doing so, it cited the same authorities as the EEOC, and additional ones. *See id.* at 580-81 (citing, in addition, *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc)); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993). However, as a general matter, we are not persuaded by the EEOC's position.

To begin, we are not convinced that we are at liberty to disregard the plain terms of our *Toledo* and *Thomas* decisions, which place the prima facie burden on the plaintiff to establish that the applicant or employee has initially informed the employer of the conflicting religious practice and the need for an accommodation. Moreover, even if the plain language of our precedent left the resolution of the question unclear, construing that language to require the applicant or employee to initially inform the employer of the conflicting religious practice and the need for accommodation aligns our court with a substantial body of circuit precedent. And, for the reasons that we explicate in Part II.C.2-4, *infra*, we believe that these authorities embody the sounder legal view.

Furthermore, even were we to assume that *Toledo* and *Thomas* would permit a plaintiff to establish a prima facie case without demonstrating that the applicant or employee was the source of the employer's notice of the need for a religious accommodation, the EEOC could not prevail here. That is because such notice would need to be based on an employer's particularized, *actual* knowledge of the key facts that trigger its duty to accommodate. And, as explicated below, there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had such *actual* knowledge—*from any source*—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it.[8]

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[8] Under Title VII, an employer is defined to include "any agent," 42 U.S.C. § 2000e(b), and, in varying degrees, an employer may be held responsible for the conduct of its agents. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) ("We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area."). In the Title VII disparate-treatment context, ordinarily the identity of the person acting as the employer's decision-maker in the particular employment decision is a significant fact—although not necessarily a determinative one. *See Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1166 (10th Cir. 2007) (en banc) ("In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision*." (quoting *Watts v. City of Norman*, 270 F.3d 1288, 1295 (10th Cir. 2001)) (internal quotation marks omitted)); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006) ("In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who *lacks decisionmaking power*, uses the formal decisionmaker as

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a dupe in a deliberate scheme to trigger a discriminatory employment action." (emphasis added)); *cf. Conroy v. Vilsack*, 707 F.3d 1163, 1173 n.3 (10th Cir. 2013) (noting that the plaintiff "does not articulate a cat's paw theory of liability"). The district court determined that Ms. Cooke "had responsibility for hiring decisions at the Abercrombie" store where Ms. Elauf sought employment. Aplt. App. at 581 n.11. Abercrombie argues to the contrary; it asserts that the decision-maker was Mr. Johnson, noting that "both Cooke and Johnson identified Johnson as the decision-maker." Aplt. Opening Br. at 16 n.7. In *Thomas*, we recognized that, although we employ the *McDonnell Douglas* framework in the religion-accommodation context—as we do in the disparate-treatment context—the nature of the inquiry is distinct. *See* 225 F.3d at 1155 n.6 (noting that "the burden-shifting mechanism" of *McDonnell Douglas* is employed "not to probe the subjective intent of the employer" but rather to permit courts in the summary judgment context to "determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered" (quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 n.12 (10th Cir. 1999) (en banc)) (internal quotation marks omitted)). Whether the identity of the decision-maker is also a significant fact in the religion-accommodation context is a question that we need not endeavor to answer here. *Cf. Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 874 (9th Cir. 1989) (analyzing a Washington State disability statute requiring employers "to make a reasonable accommodation" and noting "we believe that the district court erred in finding that [the employer's] management's lack of personal knowledge of [the employee's] migraine condition insulates the company from liability; [the employer] was in fact on notice of [the employee's] condition as a result of [the employee's] supervisor's full awareness of his condition and thus must be held responsible for any failure to attempt a reasonable accommodation"). It is undisputed that Ms. Cooke and Mr. Johnson were agents of Abercrombie; that fact suffices for our purposes. If, as we demonstrate *infra*, there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process—that is, Ms. Cooke and Mr. Johnson—

The authorities that the EEOC and the district court have relied upon clearly have predicated their notice holdings on the employer's particularized, actual knowledge. We need not (and do not) endorse their specific holdings and, in particular, their conclusions about how much actual knowledge is sufficient to put an employer on notice of the need to accommodate; yet, there is no doubt that these cases settled for nothing less than some significant measure of particularized, actual knowledge.

In *Dixon*, for example, the plaintiffs "presented evidence that they are sincere, committed Christians who oppose efforts to remove God from public places." 627 F.3d at 855. In rejecting the employer's contention that the plaintiffs had never advised them of their need for a religious accommodation, the Eleventh Circuit stated:

> [The employer] knew that the [plaintiffs] were dedicated Christians who had previously opposed policies prohibiting the public display of religious items. [The employer] argues that the [plaintiffs] never expressly told [their supervisor] that they did not want to take down their artwork because they opposed efforts to remove God from public places. However, we conclude that if [the supervisor] was aware of the tension between her order and the [plaintiffs'] religious beliefs—and

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possessed particularized, actual knowledge, from any source, that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it, it ineluctably follows that no Abercrombie decision-maker (whether Ms. Cooke or Mr. Johnson, or both) possessed this requisite knowledge.

there is ample evidence that she was—her awareness would satisfy the second prong.

Id. at 855-56. In other words, in concluding that the plaintiffs had satisfied the second element of their prima facie case related to notice, the Eleventh Circuit determined that the employer had actual knowledge of the religious beliefs of the particular plaintiffs and of the actual conflict between those beliefs and the employer's work rules. As to the latter point, based upon the plaintiffs' prior affirmative and open opposition to the employer's policies regarding the display of religious items, the employer had actual knowledge that the plaintiffs' beliefs about the removal of God from public places were inflexible and not simply a personal preference.

The district court in *Hellinger* (the other case upon which the EEOC relies) put an even finer point on the actual-knowledge issue. The plaintiff there was "an Orthodox Jew" who "applied for a part-time position with [the employer] as a pharmacist." 67 F Supp. 2d at 1361. "Although Plaintiff cannot sell condoms due to his religious beliefs, he did not list any religious restrictions on his application or make any request for an accommodation. Nor did he inform [the employer's hiring agent] about his religious beliefs or restrictions at the time he dropped off his application." *Id.*

It was undisputed that the employer's hiring agent was "informed" by another of its employees, who was listed as "one of the Plaintiff's references," "that the Plaintiff refused to sell condoms due to his religious beliefs" and that the hiring agent, consequently, "decided not to pursue the Plaintiff's application for em-

ployment." *Id.* Nevertheless, the employer "argue[d] that the Plaintiff cannot establish a *prima facie* case of religious discrimination because the Plaintiff did not inform the Defendant of his religious restriction or his need for accommodation." *Id.* at 1360. The district court would have none of that argument. Although the district court cautioned that it was "not plac[ing] the burden of inquiry on the employer," *id.* at 1364, it held "that the Plaintiff sets forth a *prima facie* case of religious discrimination because [the employer] had actual knowledge of the Plaintiff's religious beliefs and decided not to pursue the Plaintiff's employment application based on that information," *id.* at 1360.

Furthermore, the additional authorities that the district court relied upon in the instant case are of the same or similar effect in that they insist on nothing less than the employer's particularized, actual knowledge to satisfy the second element of the prima facie case. *See Brown*, 61 F.3d at 654 ("[W]e reject the defendants' argument that because [the plaintiff] never explicitly asked for accommodation for his religious activities, he may not claim the protections of Title VII. Because the first reprimand related directly to religious activities by [the plaintiff], we agree with the district court that the defendants were well aware of the potential for conflict between their expectations and [the plaintiff's] religious activities."); *Heller*, 8 F.3d at 1436, 1439 (holding that the plaintiff established the second element of his prima facie case for failure to accommodate his "religious practice of attending the ceremony in which his wife and children were converted to Judaism," where the plaintiff's supervisor "knew" that he was Jewish, "knew" that his

"wife was studying for conversion," and "when [the plaintiff] requested the time off, he informed the [supervisor] why he needed to miss work").

In other words, even were we to assume that an employer may be put on notice from a source other than applicants or employees, that source would need to provide the employer with sufficient information such that the employer would have actual knowledge that the conflicting practice of the *particular* applicants or employees is based upon their religious beliefs and that they need an accommodation for it. Thus, even under this broader view of the notice requirement, a plaintiff—that is, an applicant or employee—should not be able to impose liability on an employer for failing to accommodate his or her religious practice on the ground that the employer should have guessed, surmised, or figured out from the surrounding circumstances, that the practice was based upon his or her religion and that the plaintiff needed an accommodation for it. Accordingly, even were we to adopt the EEOC's position, as supported by its authorities, the employer's notice would need to be based upon its particularized, actual knowledge of the key facts that trigger its duty to provide a reasonable religious accommodation—that is, based upon actual knowledge that the conflicting practice of the *particular* applicant or employee stems from his or her religion and that the applicant or employee needs an accommodation for it (because the practice is an inflexible one).

The EEOC cannot make this showing here: there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring

process had particularized, actual knowledge—*from any source*—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it. Therefore, the EEOC cannot prevail.

In particular, we conclude that the record offers absolutely no support for the district court's determination that Ms. "Cooke *knew* [that Ms. Elauf] wore the head scarf based on her religious belief." Aplt. App. at 581 (emphasis added). The EEOC also is clearly mistaken on this point. *See* Aplee. Br. at 46 ("It is uncontested that Cooke was aware of Elauf's religious belief and its conflict with the Look Policy. "). At best, when viewed in the light most favorable to the EEOC, the record indicates that Ms. Cooke *assumed* that Ms. Elauf wore her hijab for religious reasons and felt religiously obliged to so—thus creating a conflict with Abercrombie's clothing policy.

More specifically, Ms. Cooke testified as follows: that she had seen Ms. Elauf wearing a headscarf prior to the interview, but "did not know" Ms. Elauf's religion, Aplt. App. at 365; that she "*assumed* that she was Muslim," *id.* (emphasis added), and "*figured* that was the religious reason why she wore her head scarf," Aplee. Supp. App. at 48 (emphasis added), and she assumed that, if Ms Elauf were hired by Abercrombie as a Model, she would continue to wear her headscarf, *see id.* at 46 (answering "Yes, I did." to the question, "And you assumed if [Ms. Elauf] worked at Abercrombie, she would still be wearing [a headscarf]?").

In the interview, Ms. Cooke did not ask Ms. Elauf if she was a Muslim. And for reasons that we have ex-

plored at length, *see* Part II.B.1, *supra*, given Title VII's conception of religion as a uniquely personal and individual matter, Ms. Cooke's knowledge that Ms. Elauf elected to wear a hijab would be far from sufficient information to provide her with the requisite notice that would trigger an employer's duty to accommodate. *See Wilkerson*, 522 F.3d at 319 ("[S]imply announcing one's belief in a certain religion, or even wearing a symbol of that religion (i.e., a cross or Star of David) does not notify the employer of *the particular beliefs and observances* that the employee holds in connection with her religious affiliation." (emphasis added)); *Reed*, 330 F.3d at 935-36 ("A person's religion is not like his sex or race—something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulka, this may not pinpoint *his particular beliefs and observances.* " (emphasis added)); *see also* Aplt. App. at 292 (indicating that the EEOC's expert offered, as an explanation for why people maintain certain styles of dress, "it really is, the question is, what is their motivation"). In sum, Ms. Cooke's testimony does not even come close to establishing that Ms. Cooke possessed particularized, actual knowledge that Ms. Elauf (and not some hypothetical Muslim female) wore a hijab because of *her* Islamic faith and felt religiously obliged to do so, and thus would require a religious accommodation in order to address the conflict with Abercrombie's clothing policy.[9]

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[9] The EEOC suggests that, even if Ms. Cooke's understanding of Ms. Elauf's religious beliefs and her need for an accommodation was solely predicated on her assumption, her assumption was actu-

Moreover, even construing the facts (as we must) in the light most favorable to the EEOC, the fact that Ms. Cooke called Mr. Johnson to discuss the possibility of an accommodation does nothing to rectify this fundamental evidentiary deficiency in the EEOC's case. Ms. Cooke's conduct following the interview was all based on her admitted *assumption* regarding Ms. Elauf's religious beliefs and required practices. *See*

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ally correct, so Abercrombie was put on adequate notice. *See* Aplee. Br. at 45 ("It is uncontested that Cooke correctly interpreted Elauf's wearing a headscarf as indicating that she is Muslim and wore the headscarf for a religious purpose. As such, the court would still be correct that it was uncontested that Abercrombie was on sufficient notice of Elauf's religious belief."). There is no foundation in the law for the view that the requisite notice for purposes of a Title VII religion-accommodation claim could ever conceivably rest on anything less than an employer's particularized, *actual* knowledge; that an employer was able to make a correct guess or assumption would not mean that the employer possessed such actual knowledge. Simply put, a correct assumption does not equal actual knowledge. And this basic truth takes on considerable significance in the religion-accommodation context because once the employer is found to have received sufficient notice, the employer must actively engage in the interactive accommodation process. But an employer would not know whether its guess or assumption was correct until after the fact, so there would be instances in which the employer would begin participating in the interactive process based upon a guess or assumption—and invariably discuss or explore the purported religious beliefs and needs of an applicant or employee—when there actually was no need to do so (i.e., because the employer's assumption or guess was wrong). This approach would run afoul of the EEOC's own express policy guidance, which discourages employers from initiating discussions about the religious beliefs of applicants (or employees) and from operating in the accommodation process based upon stereotypes, speculation, and conjecture. *See* Part II.B.2, *supra*.

Aplt. App. at 76-77 ("I was unsure about the head scarf. I told [Mr. Johnson] that I *believed* that [Ms. Elauf] was Muslim, and that was a recognized religion. And that she was wearing it for religious reasons." (emphasis added)). She did not possess the requisite actual knowledge concerning these matters. And any awareness that Mr. Johnson had of Ms. Elauf's religious beliefs and required practices would have been derived solely from Ms. Cooke's assumption; so, Mr. Johnson, too, possessed no particularized, actual knowledge.

Yet, the only two Abercrombie agents who could conceivably be deemed to have had any responsibility for, or involvement in, the hiring process regarding Ms. Elauf, were Ms. Cooke and Mr. Johnson.[10] Therefore, even if the EEOC were permitted as a matter of law to establish the second element of its prima facie case by showing that the employer possessed particularized, actual knowledge from a source *other than* the applicant or employee of the key facts that trigger its duty to provide a reasonable religious ac-

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[10] It is true that, in responding to Ms. Elauf's inquiry about wearing a headscarf, Ms. Sepahvand (her friend and an Abercrombie employee) testified that she had raised the issue with assistant manager Kalen McJilton, who knew Ms. Elauf from her prior visits to the store. Noting that he had previously worked at Abercrombie with someone who wore a white yarmulke, Mr. McJilton suggested that he did not see any problem with Ms. Elauf wearing a headscarf, "especially if she didn't wear a headscarf that was black." Aplee. Supp. App. at 181 (internal quotation marks omitted). However, there is no evidence that Mr. McJilton had any responsibility for, or involvement in, the hiring process regarding Ms. Elauf.

commodation, the EEOC could not do so here because neither Ms. Cooke nor Mr. Johnson (i.e., the relevant agents of the employer) possessed such knowledge. Accordingly, even under the broader view of the notice requirement that the EEOC principally espouses here, it cannot prevail.[11]

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[11] We note that the EEOC also takes a different tack to defeat this outcome. Recall that, following her discussion with Mr. McJilton, Ms. Sepahvand communicated to Ms. Elauf that a headscarf would be permitted, but because of Abercrombie's no-black-clothing policy, she would not be able to wear a black one. Based upon this relaying of information, the EEOC argues that "there is no evidence suggesting that Elauf had any reason to believe that her headscarf had not already been approved by Abercrombie, or that Elauf had any reason to ask any questions about her headscarf at the interview." Aplee. Br. at 45. The EEOC's argument, however, is wholly unpersuasive. Ms. Elauf could not possibly have formed a reasonable judgment in these circumstances based upon second-hand information delivered by her friend, Ms. Sepahvand—who was not herself a member of Abercrombie management, nor involved in Ms. Elauf's hiring process—that Abercrombie had agreed to accommodate her practice of wearing a hijab and, as a consequence, that she was free to remain silent about that practice in the interview. This is especially true because, prior to the interview, Ms. Elauf was well aware that employee attire was a significant matter to Abercrombie—that is, a matter of considerable consequence—and the person who Ms. Elauf reasonably could have concluded had some responsibility in her hiring process, Ms. Cooke, expressly raised the topic of employee attire in the interview *without* indicating that Abercrombie would accommodate Ms. Elauf's practice of wearing a hijab. Contrary to the EEOC's contention, then, we conclude that there was no evidence to reasonably support the notion that Abercrombie's conduct led Ms. Elauf to believe she had no need to speak up to secure an accommodation for her claimed religious practice of wearing a headscarf.

We do recognize that in its briefing, the EEOC intimates that something less than an employer's particularized, actual knowledge would suffice. *See* Aplee. Br. at 34 ("[T]his is not to say that employers are required to inquire of applicants or employees as to whether there are any religious beliefs that need to be accommodated, absent *some reasonable indication* to the employer that an accommodation *may* be needed." (emphases added)). However, it cites no authorities to support this proposition, and we are not aware of any. *See* Aplt. Reply Br. at 2 ("Had courts intended that 'reasonable indication' (or some other sort of construc-

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Moreover, lest there be any doubt, an employer is not legally obligated under Title VII to prompt applicants or employees to deliver notice of the need for a religious accommodation, by initially recounting a laundry list of all of the practices that employees *cannot* do in the workplace. The burden rests with applicants or employees to ensure that the workplace will be a suitable work environment for them, in light of their required religious practices. *See Chalmers*, 101 F.3d at 1019 ("Initially, [the plaintiff] asserts that [the employer] never explicitly informed her of a company policy against writing religious letters to fellow employees at their homes and so she had no reason to request an accommodation. However, companies cannot be expected to notify employees explicitly of all types of conduct that might annoy co-workers, damage working relationships, and thereby provide grounds for discharge." (citation omitted) (internal quotation marks omitted)). Thus, the EEOC's suggestion to the contrary is misguided. *See* EEOC Response to Abercrombie's Rule 28(j) Letter, No. 11-5110, at 1 (10th Cir., filed May 11, 2012) ("[I]t is uncontested that Elauf was not informed at any time by Abercrombie that it has an unwritten prohibition on Models wearing headscarves. Therefore, there was no reason for Elauf to believe there was any conflict requiring accommodation." (citation omitted)); *see also* Aplt. App. at 55 (testifying that Ms. Cooke did not tell her (Ms. Elauf) that she "wouldn't be able to wear [her headscarf] or anything like that").

tive notice) be sufficient to satisfy the *prima facie* case, they would have said so.")

In sum, we hold that, in order to establish the second element of their prima facie case under Title VII's religion-accommodation theory, ordinarily plaintiffs must establish that they initially informed the employer that they engage in a particular practice for religious reasons and that they need an accommodation for the practice, due to a conflict between the practice and the employer's work rules. As noted, we recognize that some courts have taken a different path on this question. However, we are confident that our approach is the sounder one.

2

Given Title VII's conception of religion and the interactive nature of the religion-accommodation process, we are hard-pressed to see how we could logically reach another conclusion regarding the notice element of the prima facie case. This is because the answers to the key questions that determine whether an employer has an obligation under Title VII to provide a reasonable religious accommodation ordinarily are only within the ken of the applicant or employee; because an employer's obligation to engage in the interactive religion-accommodation process is only triggered when the employer has answers to those questions; and because, in implementing Title VII's anti-discrimination mandate, the EEOC has expressly disapproved of employers inquiring in the first instance or speculating about the answers to such questions.

For example, recall that Title VII only obliges employers to provide a reasonable accommodation for

practices that applicants or employees engage in because of bona fide, sincerely held religious beliefs. *See, e.g.*, *EEOC Q & A*, *supra* ("Title VII requires employers to accommodate only those religious beliefs that are religious and sincerely held. " (internal quotation marks omitted)). As noted, those beliefs are defined broadly, but "typically concern[] ultimate ideas about life, purpose, and death." EEOC Compliance Manual § 12-I(A)(1) (internal quotation marks omitted). Title VII does not extend its protections to practices that are engaged in as a matter of personal preference or for cultural reasons, *see, e.g.*, *Reed*, 330 F.3d at 935 ("[A]n employee is not permitted to redefine a purely personal preference or aversion as a religious belief."), and no matter how strongly an applicant or employee believes in certain political, economic, or social ideas, if those ideas do not otherwise relate to the stuff of religion (e.g., ultimate notions about life, purpose, or death), then practices based upon them do not fall within Title VII's protective ambit, *see, e.g.*, EEOC Compliance Manual § 12-I(A)(1).

But how is an employer to know that applicants or employees are engaged in a practice for religious reasons, unless they inform the employer? *Cf. id.* ("Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons."). To be sure, in certain instances, applicants or employees may engage in practices that are traditionally associated with a particular religion. However, Title VII does not require employers to become knowledgeable about the customs

and observances of religions. *See, e.g., Wilkerson*, 522 F.3d at 319 ("[W]e do not impute to the employer the duty to possess knowledge of particularized beliefs of religious sects."); *Reed*, 330 F.3d at 936 (noting that "employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects"); EEOC Compliance Manual § 12-IV(A)(1) (noting that an employee "cannot assume that the employer will already know or understand" "the religious nature of the belief or practice at issue").

Furthermore, even if an employer was generally aware of the beliefs and observances that are traditionally associated with a particular religious group, and also knew that the applicant or employee displayed symbols associated with that group—or even that the applicant or employee specifically claimed to be a member of that group—ordinarily, the employer would still not know whether the conflicting practice in question actually stemmed from religious beliefs unless the particular applicant or employee informed the employer, because under Title VII, as we have discussed, religion is a uniquely personal and individual matter. *See, e.g.*, EEOC Compliance Manual § 12-I(A)(1) ("An employee's belief or practice can be 'religious' under Title VII even if the employee is affiliated with a religious group that does *not* espouse or recognize that individual's belief or practice, or if few—or no—other people adhere to it." (emphasis added)); *see also id.* ("[A] person's religious beliefs need not be confined in either source or content to traditional or parochial concepts of religion. A belief is religious for Title VII purposes if it is *religious in the person's own scheme of things.* " (emphasis added) (footnotes omitted)

(internal quotation marks omitted)). In holding that Title VII places a "duty on the employee to give fair warning of the employment practices that will interfere with his religion," *Reed*, 330 F.3d at 935, the Seventh Circuit succinctly and cogently touched on a like point. Specifically, the court in *Reed* stated: "A person's religion is not like his sex or race—something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulka, this may not pinpoint *his particular beliefs and observances.*" *Id.* at 935-36 (emphasis added).

Similarly, in upholding the dismissal of the plaintiff's religion-accommodation claim because she failed to inform her employer of her need for an accommodation due to a conflict between her Christian beliefs and the employer's "libation" or alcohol-drinking ceremony, the Third Circuit in *Wilkerson* rejected the plaintiff's suggestion that the employer's knowledge that she was a Christian was enough to trigger its accommodation obligation. Specifically, the Third Circuit stated, "that [the employer] knew she was a Christian does not sufficiently satisfy [the plaintiff's] duty to provide 'fair warning' to [the employer] that *she possessed a religious belief* that specifically prevented her from participating in the libations ceremony." *Wilkerson*, 522 F.3d at 319 (emphasis added). Indeed, the Third Circuit went further and concluded that even if the employer "suspected" that the libations ceremony would be specifically offensive to the plaintiff, that would not relieve the plaintiff of the obligation to "inform the defendants that the libation ceremony would offend *her religious beliefs.*" *Id.* at 319-20 (emphasis added). In the same vein, in upholding the denial of

the plaintiff's religion-accommodation claim, the Fourth Circuit rejected the plaintiff's argument that the employer's knowledge of the plaintiff's strongly held religious beliefs was enough to "put it on notice" that those beliefs would—*in the plaintiff's view*—oblige her to "write, and send, personal, accusatory letters to co-workers at their homes." *Chalmers*, 101 F.3d at 1020 n.3. Therefore, even if an employer were on notice that an applicant or employee subscribed to a particular religious belief system, because religion under Title VII is a uniquely personal matter, that information would not be enough to tell the employer what practices are religious in "the person's own scheme of things." EEOC Compliance Manual § 12-I(A)(1) (internal quotation marks omitted). Ordinarily, the only way the employer would know such information is if the applicant or employee informed the employer.

Knowing this much demonstrates why the most natural reading of Title VII's religion-accommodation provision is one that ordinarily places the burden on the applicant or employee to inform the employer of the conflicting religious practice and the need for an accommodation, and why a contrary reading of the statute would be patently unfair to employers. *Reed* provides a hypothetical that powerfully underscores this point:

> Suppose the employee is an Orthodox Jew and believes that it is deeply sinful to work past sundown on Friday. He does not tell his employer, the owner of a hardware store that is open from 9 a.m. to 6 p.m. on Fridays, who leaves the employee in sole

> charge of the store one Friday afternoon in mid-winter, and at 4 p.m. the employee leaves the store. The employer could fire him without being thought guilty of failing to accommodate his religious needs.

330 F.3d at 936. A contrary reading of the statute would be, we think, misguided and quite unfair because "at that time" when the employer fired the employee "there was nothing to accommodate." *Wilkerson*, 522 F.3d at 319. As in *Reed*, "[t]his case is similar" to the hypothetical: Ms. Elauf undisputedly did not inform Abercrombie that her conflicting practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation; consequently, as with the hypothetical employer, Abercrombie could elect not to hire Ms. Elauf "without being thought guilty of failing to accommodate [her] religious needs." 330 F.3d at 936. Nothing was present to accommodate.

Moreover, contrary to the EEOC's suggestion at oral argument, *see* Oral Arg. at 26:40-27:10, the fact that an applicant's headscarf (like Ms. Elauf's) was visible would not materially distinguish her circumstances from those of the person whose religious beliefs did not allow for work on the Sabbath. Even though that person's religious beliefs regarding the Sabbath would be invisible to the naked eye, so would the religious significance that the applicant attached to wearing the headscarf. As noted, Muslim women (and certainly non-Muslim women) wear headscarfs for reasons other than religion, and whether they are doing so for religious reasons depends on their (invisible) "motivation." EEOC Compliance Manual § 12-I(A)(1);

see Aplt. App. at 292 (indicating that the EEOC's expert opined, regarding the reasons why people maintain certain dress, "it really is, the question is, what is their motivation"). Therefore, employers confronted with the Sabbath-adherent and the headscarf-wearer would be similarly situated—that is, they would not reasonably be put on notice of the need for a religious accommodation unless they were informed of it by the applicant.

Lastly, even if an employer has particularized, actual knowledge of the religious nature of the practice —that is, knowledge that the practice of a *particular* applicant or employee stems from his or her religious beliefs—that still would not be sufficient information to trigger the employer's duty to offer a reasonable accommodation. That is because the applicant or employee may not actually *need* an accommodation. In other words, an applicant or employee may not consider his or her religious practice to be inflexible; that is, he or she may not feel obliged by religion to adhere to the practice. If that is the situation, then there actually is no conflict, nor a consequent need for the employer to provide a reasonable accommodation. Given that "[a] belief is religious for Title VII purposes if it is religious in *the person's own scheme of things*," EEOC Compliance Manual § 12-I(A)(1) (emphasis added) (internal quotation marks omitted), whether a particular practice is religiously *required* is ultimately a question that only a particular individual can answer—even if the same practice is customarily required in the religion that the person claims to follow. *Cf. Turner*, 2009 WL 2567962, at *2 (noting that the record did not indicate that the plaintiff ever told his employer "that

his religious beliefs *required a meeting* with his pastor at that time or that the meeting was anything other than a personal preference" (emphasis added)).

As we suggested in *Thomas*, Title VII's "interactive process requires participation by *both* the employer and the employee." 225 F.3d at 1155 (emphasis added). Yet, how can an employer meaningfully participate in the accommodation process, when it lacks concrete information from which to discern a need to do so? *See Wilkerson*, 522 F.3d at 319 ("Because [the plaintiff] did not inform [her employer] that the [libation] ceremony presented a [religious] conflict, it did not have a duty to accommodate her. Although [the plaintiff] told [her employer] after the fact, *at that time there was nothing to accommodate.*" (emphasis added)); Larson, *supra*, § 56.05, at 56-21 ("Indeed, it would seem unreasonable to require an employer to accommodate the religious practices of an employee when the employer is *unaware* of the *need* to do so." (emphases added)).

It is true that logic does not perforce dictate that just because the foregoing critical questions ordinarily must be answered by the particular applicant or employee, before the employer's duty to offer a reasonable accommodation is triggered, that the applicant or employee must *initiate* the communication: it is conceivable that one could fashion a regulatory regime in which the employer was obliged to inquire in the first instance concerning the religious beliefs and needs of applicants or employees. Yet, under Title VII's interactive accommodation scheme, it is clear that, not only is the employer not obliged to make such religious in-

quiries, the employer is *affirmatively discouraged* from doing so because "an applicant's religious affiliation or beliefs are generally viewed as non job-related and problematic under federal law." *EEOC Pre-Employment Inquiries, supra; see, e.g., Prise*, 657 F Supp. 2d at 597 (noting that questioning applicants concerning their religious beliefs could, "under some circumstances, permit an inference to be drawn that an employer engaged in improper religion-based discrimination"); *EEOC Best Practices, supra* ("In conducting job interviews, employers can ensure nondiscriminatory treatment by inquiring about matters directly related to the position in question."). Furthermore, as we have discussed, in the religion-accommodation context, the EEOC has specifically cautioned employers to "avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate." *EEOC Best Practices, supra; see id.* (noting that "[m]anagers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices"). Thus, if under Title VII an employer is affirmatively discouraged from asking applicants or employees whether their seemingly conflicting practice is based on religious beliefs, and, if so, whether they actually will need an accommodation for the practice, because it is inflexible (i.e., truly conflicting), *and* the employer also is discouraged by the EEOC from speculating about such matters, then the interactive accommodation process ordinarily only can be triggered when applicants or employees first provide the requisite information to the employer.

In sum, in light of Title VII's conception of religion and the interactive nature of the religion-accommodation process, we have difficulty seeing how we could logically reach a conclusion other than the one that we explicate here regarding the notice element of the prima facie case.

3

a

We also find further support for our view of the notice requirement—which places the onus on the applicant or employee to initially provide explicit notice to the employer of the conflicting religious practice and the need for an accommodation—in references found in the EEOC's own regulations and policy documents regarding the source of the employer's notice. These authorities—repeatedly, expressly, and unequivocally—assign the notice responsibility to the applicant or employee. Beginning with its substantive regulation, the EEOC states, "*After an employee or prospective employee notifies* the employer of his or her need for a religious accommodation, the employer has an obligation to reasonably accommodate the individual's religious practices." 29 C.F.R. § 1605.2(c)(1) (emphasis added). In other words, by its plain terms, the regulation contemplates that the employer's duty to provide a reasonable religious accommodation comes after it receives notice from the prospective employee or employee. If no such notice is provided, it would seem to ineluctably follow under the regulation that the employer has no duty to provide a reasonable religious accommodation and cannot (as a matter of law) be held liable for failing to do so.

The agency's compliance manual follows suit and, notably, underscores that the notice provided by the applicant or employee cannot consist of "vague reference[s]," *Johnson*, 762 F.2d at 673, but instead must be specific:

> An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it.

EEOC Compliance Manual § 12-IV(A)(1).

To be sure, there is not any particular talismanic litany that the applicant or employee must recite to effectively put the employer on notice. In this regard, the EEOC states, "No 'magic words' are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement. To request an accommodation, an individual may use plain language and need not mention any particular terms such as 'Title VII'or 'religious accommodation.'" *Id.* But the EEOC does insist that the applicant or employee "provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job."[12] *Id.*

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[12] Indeed, the EEOC effectively underscores by a hypothetical that an applicant or employee cannot remain silent before the em-

And other policy documents of the EEOC are of similar import, placing the burden on the applicant or the employee to provide notice to the employer of the conflicting religious practice and the need for an accommodation. *See, e.g.*, *EEOC Best Practices*, *supra* (noting that "[e]mployees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules" and they "should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or

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ployer regarding the religious nature of his or her conflicting practice and need for an accommodation and still hope to prevail in a religion-accommodation case:

> **EXAMPLE 29 Failure to Advise Employer That Request Is Due to Religious Practice or Belief**
>
> Jim agreed to take his employer's drug test but was terminated because he refused to sign the accompanying consent form. After his termination, Jim filed a charge alleging that the employer failed to accommodate his religious objection to swearing an oath. Until it received notice of the charge, the employer did not know that Jim's refusal to sign the form was based on his religious beliefs. Because the employer was not notified of the conflict at the time Jim refused to sign the form, or at any time prior to Jim's termination, *it did not have an opportunity to offer to accommodate him*. The employer has not violated Title VII.

EEOC Compliance Manual § 12-IV(A)(1) (emphasis added). In our view, the facts of this hypothetical are closely akin to the facts present here: at no point during her interview with Ms. Cooke (Abercrombie's agent) did Ms. Elauf expressly inform her—directly or indirectly—that she wore her hijab for religious reasons and felt obliged to do so, and, therefore, would need an accommodation. Like the hypothetical employer, Abercrombie did not have a chance to accommodate Ms. Elauf's allegedly religious practice.

belief"); *EEOC Q & A*, *supra* (responding to the question, "[h]ow does an employer learn that accommodation may be needed?" by stating, "[a]n applicant or employee who seeks religious accommodation *must* make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work" (emphasis added)). In sum, the clear, unequivocal guidance reflected in the EEOC's own regulation and policy documents supports our view that the onus is upon the applicant or employee to initially provide explicit notice to the employer of the conflicting religious practice and the need for an accommodation.

b

The EEOC intimates that this reading of its regulation and policy documents is too facile. *See* Aplee. Br. at 39 ("These policy documents and regulations do not elevate form over substance and require this Court to take a nonsensical approach to the notice requirement."). In effect, the EEOC contends that the plain language of these materials do not tell the complete story because they do not take into account the circumstances of the instant case—where, in the EEOC's view, the employer had notice from a source other than an explicit communication from the applicant of the need to provide a religious accommodation. *See id.* at 38-39 ("[T]he Commission's policy documents do not address the situation where there is evidence that the employer was aware of the applicant's religious belief without the applicant herself so 'informing' it. As such, none of these policy documents indicates that an employer is excused from its obligation to provide rea-

sonable accommodation for an applicant's religious belief that conflicts with a work requirement simply because someone other than the applicant herself informed the employer of the belief." (quoting EEOC Compliance Manual § 12-IV(A))); *id.* at 39 ("[A]s with the aforementioned policy documents, the regulations do not address the situation where the employer is *otherwise aware* of the individual's religious belief, and accordingly do not preclude a plaintiff from satisfying the notice requirement under such circumstances." (emphasis added)). The EEOC asserts that its reading of the scope of its regulation, 29 C.F.R. § 1605.2(c), is entitled to *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

However, we believe that the EEOC's views are unpersuasive and cannot control the outcome here. Notably, we conclude that "there are strong reasons for withholding the deference that *Auer* generally requires." *Christopher v. SmithKline Beecham Corp.*, — U.S. —, 132 S. Ct. 2156, 2167, 183 L. Ed. 2d 153 (2012). "*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief. " *Id.* at 2166; *see Chase Bank USA, N.A. v. McCoy*, — U.S. —, 131 S. Ct. 871, 880, 178 L. Ed. 2d 716 (2011) ("[W]e defer to an agency's interpretation of its own regulation, advanced in a legal brief. "); *see also Decker v. Nw. Envtl. Def. Ctr.*, — U.S. —, 133 S. Ct. 1326, 1337, 185 L. Ed. 2d 447 (2013) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it. ").

However, "this general rule does not apply in all cases." *Christopher*, 132 S. Ct. at 2166; *see, e.g.*, Harry T. Edwards et al., *Federal Standards of Review*, ch. XIV (Westlaw Database updated Apr. 2013) [hereinafter *Federal Standards*] ("[T]he deference afforded an agency's interpretation of its own regulations is significant, but it is not without limits."). As a threshold matter, in order for *Auer* deference to be warranted, "the language of the regulation in question must be ambiguous, lest a substantively new rule be promulgated under the guise of interpretation." *Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002); *see Christensen v. Harris Cnty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

Even if that threshold is crossed, there are other circumstances under which the application of *Auer* deference would be unjustified:

> Deference is undoubtedly inappropriate, for example, when the agency's interpretation is plainly erroneous or inconsistent with the regulation. And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question. This might occur when the agency's interpretation conflicts with a prior interpretation, or when it appears that the

> interpretation is nothing more than a convenient litigating position.

Christopher, 132 S. Ct. at 2166 (citations omitted) (quoting *Auer*, 519 U.S. at 461-62, 117 S. Ct. 905 (internal quotation marks omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) (internal quotation marks omitted)).

In considering the appropriateness of deferring to an agency's interpretation, the *Christopher* Court also highlighted the importance of safeguarding "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" 132 S. Ct. at 2167 (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)); *see Drake*, 291 F.3d at 68 (listing as one of the "preconditions for applying this socalled *Auer* deference" that "the agency's reading of its regulation must be fairly supported by the text of the regulation itself, so as to ensure that *adequate notice* of that interpretation is contained within the rule itself" (emphasis added)); *see Federal Standards*, *supra*, ch. XIV (noting that "in *Christopher* , the Court ruled that no *Auer* deference would be afforded to an agency interpretation of a disputed regulation if the statute, published regulations, and the agency's prior enforcement regime gave no notice to regulated parties of the interpretation proposed by the agency during the course of litigation"). As the *Christopher* Court elaborated:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations

> once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

132 S. Ct. at 2168.

We decline to accord *Auer* deference to the EEOC's interpretation of its own regulation, 29 C.F.R. § 1605.2(c)(1). First, it is far from clear that the regulation is actually ambiguous concerning the central question before us: whether applicants or employees initially must provide express notice to the employer of their conflicting religious practice and their need for an accommodation, in order to trigger the employer's legal duty to provide a reasonable religious accommodation. The regulation's language seems to "plainly" answer yes to that question. *Christensen*, 529 U.S. at 588, 120 S. Ct. 1655; *see id.* ("Nothing in the regulation even arguably requires that an employer's compelled use policy *must* be included in an agreement. The text of the regulation itself indicates that its command is permissive, not mandatory."); *cf. Chase Bank*, 131 S. Ct. at 879-80 (noting that "the key question" was "whether the [interest-rate] increase actually changed a 'term' of the Agreement that was 'required to be disclosed'" within the meaning of the regulation and concluding that the regulation was "ambiguous as to the question presented, and [the Court] must therefore look to [the agency's] own interpretation of the regulation for guidance in deciding this case"). And "if the text of a regulation is unambiguous," as appears to

be the situation here, "a conflicting agency interpretation will necessarily be 'plainly erroneous or inconsistent with the regulation' in question." *Chase Bank*, 131 S. Ct. at 882 (quoting *Auer*, 519 U.S. at 461, 117 S. Ct. 905). Thus, at the threshold, it is doubtful that *Auer* deference to the EEOC's interpretation is appropriate.

Second, even if the regulation were actually "ambiguous in its reach," *Drake*, 291 F.3d at 68, there would be "reason to suspect that the [EEOC's] interpretation does not reflect [its] fair and considered judgment on the matter in question," *Auer*, 519 U.S. at 462, 117 S. Ct. 905. As demonstrated above, through its Compliance Manual and other policy documents, the EEOC has repeatedly, explicitly, and unequivocally indicated that the notice necessary to trigger an employer's duty to provide a reasonable religious accommodation is notice that is initially provided in express terms by applicants and employees. *See, e.g.*, EEOC Compliance Manual § 12-IV(A)(1) ("The employee is obligated *to explain* the religious nature of the belief or practice at issue. '" (emphasis added)); *EEOC Best Practices, supra* (noting that "[e]mployees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules" and "should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief"). In other words, on prior occasions, the EEOC has repeatedly taken a position on the notice question that is inconsistent, and conflicts with, the interpretation of that question that it now seeks to engraft onto its regulation.

In such a circumstance, *Auer* deference is "unwarranted." *Christopher*, 132 S. Ct. at 2166; *see id.* (noting that the situation "might occur" where *Auer* deference is unjustified because "the agency's interpretation conflicts with a prior interpretation"); *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994) (noting that "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987))); *cf. Bowen*, 488 U.S. at 212-13, 109 S. Ct. 468 (noting that "[f]ar from being a reasoned and *consistent* view of the scope of [the statutory] clause," the agency's "current interpretation is contrary to the narrow view of that provision advocated in past cases"); *Drake*, 291 F.3d at 69 ("Where the agency's litigation position is consistent with its past statements and actions, there is good reason for the court to defer, for then the position seems 'simply to articulate an explanation of longstanding agency practice.'" (quoting *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304 (D.C. Cir. 2000))).

Furthermore, the EEOC does not identify any prior instance where it has taken the stance regarding notice that it does here, and its position does not appear to be anything other than a creature of this proceeding —where it is "a party to this case." *Chase Bank*, 131 S. Ct. at 881. At least coupled with its prior inconsistent conduct, this circumstance gives us some reason to suspect that the EEOC's view regarding notice

is "nothing more than an agency's convenient litigating position"; as such, giving it *Auer* deference "would be entirely inappropriate." *Bowen*, 488 U.S. at 213, 109 S. Ct. 468; *accord Christopher*, 132 S. Ct. at 2166.

Moreover, we have difficulty concluding that the EEOC has provided "adequate notice" (*Drake*, 291 F.3d at 68) or "fair warning" (*Christopher*, 132 S. Ct. at 2167 (quoting *Gates & Fox Co.*, 790 F.2d at 156) (internal quotation marks omitted)) to employers that their obligation to provide a reasonable religious accommodation may be triggered by *something other than* an explicit communication from applicants or employees regarding their conflicting religious practice and need for an accommodation.[13] Nothing in the text of the EEOC's regulation, 29 C.F.R. § 1605.2(c)(1), would "provide clear notice of this." *Christopher*, 132 S. Ct. at 2167. In describing the circumstances under which the employer's obligation to offer a reasonable religious

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[13] This would be especially true to the extent that the EEOC's interpretation of its regulation would permit plaintiffs to establish their prima facie case regarding notice by showing the employer possessed *something less* than actual knowledge of the conflicting religious practice and need for an accommodation—*viz.*, would allow plaintiffs to demonstrate notice by showing some form of employer constructive knowledge, or a "*reasonable indication* to the employer that an accommodation *may* be needed." Aplee. Br. at 34 (emphases added). This is because (as noted *supra*) the EEOC has not identified any judicial decisions supportive of such a position, nor have we uncovered any. *Cf.* Aplt. Reply Br. at 3 n.1 ("[T]he EEOC's regulations nowhere state that a 'reasonable indication' is sufficient to make a *prima facie* case. Employers should be able to rely upon the EEOC's clear pronouncements without having to fear that the EEOC will suddenly 'change its mind' to support whatever argument most benefits its then-current litigation.").

accommodation is triggered, the regulation speaks solely of "an employee or prospective employee notif[ying] the employer [of the need for such an accommodation]." 29 C.F.R. § 1605.2(c)(1). And, as commonly understood, the term "notify" means to "make a usu[ally] formal communication generally about something requiring or worthy of attention." *Webster's Third New Int'l Dictionary* 1160 (2002); *see id.* at 1545 (defining the word "notify" to mean, among other things, to "make known").

In other words, under a natural reading of the regulation, the employer's obligation to provide a reasonable religious accommodation would be triggered only when applicants or employees explicitly inform the employer of their conflicting religious practice and need for an accommodation. Indeed, this natural reading of the regulation is bolstered by the construction canon *expressio unius est exlcusio alterius*—the so-called "negative-implication canon," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012); *see Black's Law Dictionary* 661 (9th ed. 2009) (noting that it is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other"). Specifically, by expressly providing only one means by which an employer's obligation to provide a reasonable religious accommodation may be triggered—explicit notice from an applicant or employee—the regulation may be read to exclude other means by which the "thing to be done," *Christensen*, 120 S. Ct. at 1660 (quoting *Raleigh & Gaston R.R. v. Reid*, 80 U.S. 269, 13 Wall. 269, 270, 20 L. Ed. 570 (1872)) (internal quotation marks omitted), may be accomplished. According-

ly, because the EEOC's broader view of the notice requirement is divorced from the regulation's text and is not congruent with the natural reading of that text, subjecting Abercrombie to it "would result in precisely the kind of 'unfair surprise' against which [the Supreme Court's] cases have long warned." *Christopher*, 132 S. Ct. at 2167 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007)) (internal quotation marks omitted). This is yet another reason why according the EEOC's broader view *Auer* deference would be inappropriate.

Therefore, to the extent that we provide deference at all to the EEOC's broader view, the boundaries of that deference would be defined, not by *Auer*, but rather by the Supreme Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). *See, e.g., Christopher*, 132 S. Ct. at 2168-69 (turning to the *Skidmore* standard after concluding that "whatever the general merits of *Auer* deference, it is unwarranted here"). Under that decision, to give deference "would be proper only if the [EEOC's view] has the *power to persuade*, which 'depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.'" *Vance v. Ball State Univ.*,— U.S. —, 133 S. Ct. 2434, 2443 n.4, 186 L. Ed. 2d 565 (2013) (second and third alterations in original) (emphasis added) (quoting *Skidmore*, 323 U.S. at 140, 65 S. Ct. 161); *see Christopher*, 132 S. Ct. at 2168-69 (giving the agency's "interpretation a measure of deference proportional to" its satisfaction of *Skidmore*'s criteria). For the reasons that we have noted thus

far—including in this subsection and *supra* in Parts II.C.1-3.a—and that we explicate below in Part II.C.4, we conclude that the EEOC's broader view of the notice requirement is "quite unpersuasive." *Christopher*, 132 S. Ct. at 2169; *see Univ. of Tex. Sw. Med. Ctr. v. Nassar*, — U.S. —, 133 S. Ct. 2517, 2533, 186 L. Ed. 2d 503 (2013) (noting that the EEOC's "explanations lack the persuasive force that is a necessary precondition to deference under Skidmore"); *Vance*, 133 S. Ct. at 2443 n.4 ("For the reasons explained below, we do not find the EEOC Guidance persuasive.").[14]

In sum, notwithstanding the EEOC's objections, we find support in the EEOC's own regulations and policy documents for our view of the notice requirement—which places the onus on the applicant or employee to initially provide explicit notice to the employer of the conflicting religious practice and the need for an accommodation.

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[14] It bears mentioning that insofar as the EEOC's broader view of the notice requirement does not involve concepts akin to constructive notice, but rather is limited to the position that the EEOC's regulation permits plaintiffs to establish their prima facie case regarding notice by showing that the employer possessed *actual knowledge* of the conflicting religious practice and need for an accommodation *from a source other than the applicant or employee*, then even if we were obliged to accord some measure of deference to the EEOC's view, this would not materially alter the outcome that we reach here. That is because (as noted *supra*) there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had actual knowledge—*from any source*—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it.

Finally, as both parties have expressly recognized, the requirement of employers to provide reasonable accommodations for disabled employees under the ADA is analogous to Title VII's requirement that employers provide reasonable religious accommodations; thus, jurisprudence under the ADA can provide guidance as to when an employer's duty to provide a reasonable religious accommodation is triggered under Title VII. *See Thomas*, 225 F.3d at 1155 & nn.5 & 6 (recognizing the similarities between reasonable accommodation requirements in the ADA and Title VII contexts). The ADA's analogous reasonable-accommodation scheme fortifies in at least two ways our belief that our interpretation of the notice requirement in the Title VII religion-accommodation setting is correct.

First, under the ADA, an employer ordinarily has no obligation to engage in the interactive process or provide a reasonable accommodation unless the "employee provid[es] notice to the employer of the employee's disability and any resulting limitations." *Smith*, 180 F.3d at 1171. To provide the employer with notice, the employee "must make an adequate request" for an accommodation. *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011). This request must be "sufficiently direct and specific," *id.* (quoting *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 23 (1st Cir. 2004)) (internal quotation marks omitted), and "make clear that the [employee] wants assistance *for his or her disability*," *id.* (quoting *Colwell v. Rite*

Aid Corp., 602 F.3d 495, 506 (3d Cir. 2010)) (internal quotation marks omitted).

In short, under the ADA, an employer does not have a duty to provide a reasonable accommodation unless one is specifically requested by an employee. *See Koessel v. Sublette Cnty. Sheriff's Dep't*, 717 F.3d 736, 745 (10th Cir. 2013) ("It is not the employer's responsibility to anticipate the employee's needs and affirmatively offer accommodation if the employer is otherwise open to such requests."). Our reading of the notice requirement under Title VII is entirely consistent with this: an employer is only obliged to provide a reasonable religious accommodation to applicants or employees *after* they have explicitly informed the employer of their conflicting religious practice and need for an accommodation for it.

Second, the requirement of specific employee notice under the ADA is logically compatible with the nature of the data necessary to trigger the employer's reasonable-accommodation obligations. "[T]he employer must know of both the disability *and* the employee's desire for accommodations for that disability." *C.R. England*, 644 F.3d at 1049 (emphasis added) (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)) (internal quotation marks omitted). Mere awareness of the disability is insufficient because the employer remains unaware that the employee *desires an accommodation* for his or her disability. *See Woodman v. Runyon*, 132 F.3d 1330, 1345 (10th Cir. 1997) ("The 'employee's initial request for an accommodation triggers the employer's obligation to participate in the interactive

process.'" (omission in original) (quoting *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996))). Therefore, in order for the employer to gain knowledge of *both* of these facts, ordinarily the employee will need to tell the employer. *See Mole v. Buckhorn Rubber Prods.*, 165 F.3d 1212, 1218 (8th Cir. 1999) ("[An employee] cannot 'expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it.'" (second, third, and fourth alterations in original) (quoting *Ferry v. Roosevelt Bank*, 883 F. Supp. 435, 441 (E.D. Mo. 1995))).

Similarly, our view of the notice requirement is likewise compatible with the nature of the data necessary to trigger an employer's duty to provide a reasonable religious accommodation. Specifically, not only must an employer know that the practice stems from the religious beliefs of the applicant or employee, it must also know that he or she actually *needs* an accommodation for the practice. As suggested by our discussion in Part II.C.2, *supra*, Title VII's conception of the personal and individualized nature of religion and of the interactive accommodation process—under which the employer is affirmatively discouraged from making religious inquiries of applicants or employees in the first instance, or engaging in guess-work or assumptions about their religious beliefs—virtually dictates that applicants or employees must initially communicate the religious nature of the conflicting practice and their need for an accommodation to the employer, in order to trigger the employer's accommodation duty.

In sum, the ADA's reasonable-accommodation jurisprudence supports our interpretation of Title VII. The ADA places the burden on the employee to make the employer aware both of his or her disability and the employee's need for an accommodation for that disability, by adequately communicating this information to the employer in the first instance. *See C.R. England*, 644 F.3d at 1049. Our interpretation of Title VII's notice requirement in the religion-accommodation context is essentially the same. Applicants or employees must initially inform employers of their religious practices that conflict with a work requirement *and* their need for a reasonable accommodation for them. *See Thomas*, 225 F.3d at 1155; EEOC Compliance Manual § 12-IV(A)(1).

III

For the foregoing reasons, we hold that district court should have entered summary judgment in favor of Abercrombie because the EEOC did not satisfy the second element of its prima facie case, as there is no genuine dispute of material fact that Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing her hijab stemmed from her religious beliefs and that she needed an accommodation for this (inflexible) practice. Accordingly, we **REVERSE** the district court's denial of summary judgment in favor of Abercrombie and likewise, necessarily, **REVERSE** the district court's grant of summary judgment to the EEOC. We **REMAND** the case to the district court with instructions to **VACATE** its judgment and enter judgment in favor of Abercrombie,

and for further proceedings consistent with this opinion.

EBEL, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority opinion's ruling that it was error for the district court to grant summary judgment for Plaintiff-Appellee Equal Employment Opportunity Commission ("EEOC") in this case. However, I dissent in part from the majority's opinion, to the extent that it enters summary judgment for Defendant-Appellant Abercrombie & Fitch Stores, Inc. ("Abercrombie"), because I conclude on this record that a jury should decide whether Abercrombie is liable for religious discrimination.

Title VII prohibits religious discrimination in employment, including an employer's refusal to hire a job applicant because of her religion. 42 U.S.C. § 2000e-2(a)(1). Title VII defines religious discrimination to include an employer's failure to accommodate a job applicant's religious practices, if the employer can reasonably do so without incurring undue hardship to the conduct of its business. *Id.* § 2000e(j); *see Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-55 (10th Cir. 2000). Title VII imposes on the employer the duty to reasonably accommodate the religious practices of a job applicant through "an interactive process that requires participation" by both the employer and the applicant. *Thomas*, 225 F.3d at 1155.

The EEOC, on behalf of Samantha Elauf, established a triable claim that Abercrombie discriminated against Elauf on the basis of her religion when Aber-

crombie refused to hire her because of her religious practice of wearing a hijab, or head covering. Specifically, the EEOC set forth evidence from which a jury could find that Abercrombie refused to hire Elauf, without ever informing her that wearing a hijab conflicted with Abercrombie's Look Policy, in order to avoid having to discuss the possibility of reasonably accommodating Elauf's religious practice. If true, that would be religious discrimination proscribed by Title VII. Thus, I would remand this claim for a jury trial.

I. The majority's inflexible requirement that the EEOC must first establish, as part of its prima facie claim, that Elauf informed Abercrombie that its Look Policy conflicted with her religious practice of wearing a hijab makes no sense under the law or the circumstances presented by this case

The majority concludes that an employer's obligation to engage in an interactive dialogue with a job applicant regarding the need for a reasonable accommodation of her religious practice is triggered only when the job applicant herself informs the employer that her religious practice conflicts with a requirement of the job for which she is applying. The majority reaches this conclusion after applying the modified *McDonnell Douglas* burden-shifting framework applicable to failure-to-accommodate claims and holding, at the first step of that analysis, that the EEOC failed to establish a prima facie claim.[1]

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[1] Generally courts addressing a discrimination claim under Title VII apply the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under that analysis, the plaintiff employee or

In several previous cases *where the existence of a prima facie claim was not disputed*, this court stated the elements of a prima facie failure-to-accommodate claim to be that the plaintiff "(1) had a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was [not hired] for failure to comply with the conflicting employment requirement." *Thomas*, 225 F.3d at 1155 (addressing termination claim); *see also Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989). Applying these elements to this case, the majority rejects the EEOC's failure-to-accommodate claim as a matter of law because Elauf never informed Abercrombie that her religious practice of wearing a hijab conflicted with Abercrombie's Look Policy.

Of course, the reason Elauf never informed Abercrombie of this conflict is that, accepting her evidence

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job applicant must first set forth a prima facie claim of discrimination. *Id.* at 802, 93 S. Ct. 1817. If the plaintiff is able to do so, the employer must then articulate a legitimate, nondiscriminatory reason for taking the challenged employment action. *Id.* Thereafter, the burden shifts back to the plaintiff to show that the employer's proffered reason was really a pretext for discrimination. *Id.* at 804, 93 S. Ct. 1817. In addressing a claim of religious discrimination based upon a failure-to-accommodate theory, however, we apply a modified, two-step *McDonnell Douglas* analysis, asking first whether the plaintiff employee or job applicant established a prima facie failure-to-accommodate claim. *See Thomas*, 225 F.3d at 1155. If so, then the burden shifts to the employer to do one of three things: (1) rebut one or more of the elements of the plaintiff's prima facie case; (2) show it offered the plaintiff a reasonable accommodation; or (3) show it was unable to reasonably accommodate the plaintiff's religious practice without undue hardship. *Id.* at 1156.

as true as we must, Elauf did not know that there was a conflict between her religious practice of wearing a hijab and Abercrombie's Look Policy. However, critically, Abercrombie did know there might be a conflict, because it knew that Elauf wore a headscarf, assumed she was Muslim and that she wore the headscarf for religious reasons, and knew its Look Policy, as ultimately determined by Randall Johnson, the person who made the decision not to hire Elauf, prohibited its sales models from donning headwear. Based on these assumptions, and without ever informing Elauf that Johnson ultimately determined that the hijab would not be allowed, Abercrombie refused to hire her because she wore a hijab. In this way, Abercrombie was able to avoid any interactive dialogue with Elauf about whether Abercrombie could reasonably accommodate Elauf's religious practice.

Under these circumstances, it makes no sense to apply, reflexively and inflexibly, the second element of the ordinary prima facie failure-to-accommodate claim to require Elauf to show first that she informed Abercrombie that her religious practice conflicted with Abercrombie's Look Policy, when that policy's proscription against wearing a headscarf at work had never been disclosed to her. Nor are we bound, as the majority suggests, to apply the elements of a prima facie failure-to-accommodate claim as set forth in prior, factually distinct cases that did not raise or resolve the issue before us of whether it is the applicant's burden in the first instance to request a religious accommodation to an *undisclosed* employer's policy.

I conclude we are not bound here to apply this court's prior rendition of the elements of a prima facie failure-to-accommodate claim, for several reasons.

First and foremost, the specific elements of a prima facie claim must be flexible, in order to address the specific circumstances presented by a given case. The Supreme Court stressed this when it first set forth the *McDonnell Douglas* analytical framework. *McDonnell Douglas*, 411 U.S. at 802 n.13, 93 S. Ct. 1817 (noting that "[t]he facts necessarily will vary in Title VII cases, and the specification [in *McDonnell Douglas*] of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations"). This court has, on numerous occasions, recognized the need to modify the elements of a prima facie discrimination claim to fit the facts of a given case. *See Stover v. Martinez*, 382 F.3d 1064, 1077 (10th Cir. 2004) (noting *McDonnell Douglas* framework, as "modified to reflect the particular factual situation at hand," applied to Title VII religious discrimination claims); *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036-38 (10th Cir. 1993) (declining to apply prima facie elements of a failure-to-accommodate claim to a cause of action alleging that the employer fired the plaintiff employee because the employee did not share his supervisors' religious beliefs; applying, instead, a modified version of the elements of a straightforward prima facie discrimination claim).[2] "The *prima facie* case method established in

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[2] *See also, e.g., Garrison v. Gambro, Inc.*, 428 F.3d 933, 937 (10th Cir. 2005); *Plotke v. White*, 405 F.3d 1092, 1099-1100 (10th Cir. 2005); *Mattioda v. White*, 323 F.3d 1288, 1291-93 (10th Cir. 2003); *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1164 (10th Cir. 2002); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 559-60 (10th Cir. 1996); *Randle v. City of Aurora*, 69 F.3d 441, 451 n.13 (10th Cir. 1995); *Lucas v. Dover Corp.*, 857 F.2d 1397, 1400-01 (10th Cir. 1988); *Crawford v. Ne. Okla. State Univ.*, 713 F.2d 586, 588 (10th Cir. 1983).

McDonnell Douglas was 'never intended to be rigid, mechanized, or ritualistic.'" *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) (quoting *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978)).

> The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) (rejecting, in pattern-or-practice case, argument that "the McDonnell Douglas pattern [w]as the only means of establishing a prima facie case of individual discrimination").

Second, the plaintiff's burden of presenting a prima facie discrimination claim under Title VII is not meant to be onerous. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The burden of establishing a prima facie case" of disparate treatment is not onerous.); *see also Shapolia*, 992 F.2d at 1038 (noting burden of establishing prima facie religious discrimination claim is not onerous). Here, the majority not only made this initial burden onerous, but also made it preclusive of a claim for relief.

Third, the purpose of the *McDonnell Douglas* burden-shifting framework, of which the prima facie

claim is a part, is different in the context of a failure-to-accommodate claim than it is for a Title VII claim alleging discrimination generally. *See Thomas*, 225 F.3d at 1155 n.6. In a straight discrimination claim, the prima facie claim serves the purpose of probing whether the employer intended to discriminate. *See id.*; *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 n.12 (10th Cir. 1999) (reh'g en banc). The purpose of applying a modified version of the *McDonnell Douglas* burden-shifting analysis in the context of an accommodation case, on the other hand, is "simply to provide a useful structure by which the district court, when considering a motion for summary judgment, can determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered." *Thomas*, 225 F.3d at 1155 n.6 (quoting *Smith*, 180 F.3d at 1178 n.12). So, if the plaintiff asserts evidence which, if believed, would establish the employer's liability for failing to accommodate a job applicant's religious practices, then the plaintiff has established a prima facie failure-to-accommodate claim. As explained below, the EEOC has met that less-than-onerous burden here.

Before addressing how the EEOC has established a prima facie failure-to-accommodate claim in this case, however, I would stop to note that I agree with the majority that, in the ordinary case, it is the job applicant who must inform the employer that she has a religious belief that conflicts with the requirements of the job for which she is applying. This makes sense, of course, because generally it will be the job applicant who will have superior knowledge of that

conflict. It is the job applicant who knows of her religious beliefs and practices. When she becomes aware that a requirement of the job for which she is applying conflicts with her beliefs, the onus is on the job applicant to inform the employer of this conflict and the need for any accommodation. Under such circumstances, the employer has no obligation to participate in the interactive process of exploring the possibility of a reasonable accommodation until the employer knows of the conflict.[3] *See E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011) (Americans with Disabilities Act case).[4] Therefore, I do not doubt that our generalized rendition of the

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[3] It may also be the case in some situations that neither the employer nor the job applicant will know that there is a conflict between the job's requirements and the applicant's religious practices, because the employer will be aware of its work rules and the applicant will know her religious beliefs, but neither side will inform the other of these matters during the course of a job interview. Under such circumstances, no dialogue will occur between the job applicant and the employer as to this unidentified conflict, through no fault of either party. In that scenario, the employer would not be liable for failure to accommodate. However, here the facts are sufficient to permit (though not compel) a jury to find that Abercrombie did know, or thought it knew, of Elauf's religious beliefs and subverted the interactive process by declining to pursue her employment application without discussing the possibility of an accommodation with her. Thus, it is error, in my opinion, to grant summary judgment to Abercrombie on this record.

[4] Because both the Americans with Disabilities Act and Title VII's proscription against religious discrimination impose an affirmative obligation on employers to make reasonable accommodation, the Tenth Circuit applies case law addressing both statutes when considering issues surrounding reasonable accommodation. *See Thomas*, 225 F.3d at 1155 & n.5; *see also* Maj. Op. at 1122-23, 1141-43.

elements of a prima facie failure-to-accommodate claim, which require the plaintiff to show that she informed the employer of a conflict between her religious practices and the job requirements, will still apply to most failure-to-accommodate claims. But that does not mean that we must force all failure-to-accommodate claims into this prima facie mold when it makes no sense to do so under the particular facts of a given case. And that is the situation here, where, based on the EEOC's evidence, it was Abercrombie with superior knowledge of the conflict between its Look Policy and Elauf's apparent religious practice, a conflict of which Elauf was unaware.

For the reasons that follow, then, I disagree with the majority's approach in this case of requiring the EEOC, in order to state a prima facie claim, to show that Elauf informed Abercrombie that her religious practice of wearing a hijab conflicted with Abercrombie's Look Policy, the relevant provisions of which Elauf was unaware.

II. The EEOC established a prima facie claim that Abercrombie failed to accommodate Elauf's religious practice of wearing a hijab

In order to survive summary judgment, the EEOC had to establish a prima facie claim by asserting evidence that, if believed, would support Abercrombie's liability for failing to accommodate Elauf's religious practice of wearing a hijab. *See Thomas*, 225 F.3d at 1155 n.6. I conclude the EEOC met that less-than-onerous burden by showing four things: (1) Elauf had a bona fide religious belief that conflicts with Abercrombie's Look Policy; (2) she was not aware of Abercrombie's conflicting policy; (3) but Abercrombie had

knowledge that Elauf might hold religious beliefs that conflicted with its Look Policy; and (4) without informing Elauf of the provisions of its Look Policy that might conflict with her religious beliefs, Abercrombie instead refused to hire Elauf *because of* that possible conflict.

As to the first element, the district court held that the EEOC established, as a matter of law, that Elauf held a bona fide religious belief that she must wear a hijab in public. Although Abercrombie challenged that determination on appeal, I would affirm the district court's decision in that regard.

As to the second element, that Elauf was not aware that Abercrombie's Look Policy conflicted with her religious practice of wearing a hijab, it is undisputed that Abercrombie's managers never informed Elauf that the Look Policy prohibited headscarves.[5] (Aplt. App. at 299; Aple. Supp. App. at 49.) Further, there was evidence that, before she applied for a job with Abercrombie, Elauf, through a friend, inquired of one of Abercrombie's store managers whether there was a problem with her wearing a hijab while working in an Abercrombie store and was told that it would be no problem so long as the hijab was not black.[6] (Aplt. App. at 50-52, 393.)

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[5] Three of the four Abercrombie managers involved here interpreted the Look Policy to permit headscarves, so long as they were not black in color. (Aplt. App. at 393; Aple. Supp. App. at 49, 51; Maj. op. at 1113-14.) There is evidence that this would have been an acceptable accommodation of Elauf's religious beliefs. (Aplt. App. at 52.)

[6] The majority contends that this evidence does not establish that Elauf expressly informed Abercrombie of her religious prac-

As to the third element of the EEOC's prima facie claim, that Abercrombie had knowledge that Elauf might hold religious beliefs that conflicted with its Look Policy, it is undisputed that Heather Cooke, the Abercrombie assistant store manager who interviewed Elauf, "assumed that [Elauf] was Muslim," (*id.* at 307), assumed that Elauf wore a hijab for "religious reasons," (*id.*), and assumed that Elauf would wear a hijab while working in an Abercrombie store. (*Id.* at 306-07; Aple. Supp. App. at 48.)

The EEOC's showing of the second and third elements—that Elauf was unaware that her religious practice of wearing a hijab conflicted with the Look Policy, but that Abercrombie was aware there might be such a conflict—establishes circumstances that justify applying here a common sense exception to the usual rule that, in order to trigger an employer's duty to participate in the interactive dialogue regarding reasonable accommodation, the job applicant must first inform the employer that she holds religious beliefs that conflict with the job's requirements. Recognizing such a common sense exception under these

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tice of wearing a hijab and expressly sought an accommodation for that practice. I agree. But this evidence is relevant to show Elauf's state of mind, that when she interviewed for a position with Abercrombie, she did not think that the Look Policy prevented her from wearing a hijab at work. Moreover, it seems reasonable for a job applicant to check with an employer (here, the employer's representative, an assistant store manager) as to the requirements for the job and to rely upon that information unless told differently in her interview. Further, this evidence arguably suggests that Abercrombie affirmatively misled Elauf into believing that there was no problem with her wearing a hijab while working in one of Abercrombie's stores, which may explain why she did not raise the issue during her job interview.

circumstances is consistent with cases generally recognizing similar exceptions. For example, in the context of an employer's reasonable accommodation of disabilities under the Americans with Disabilities Act ("ADA"), we require, as a precondition to suit, that the employee have requested an accommodation "*unless* the employer has foreclosed the interactive process through its policies or explicit actions." *Koessel v. Sublette Cnty. Sheriff's Dep't*, 717 F.3d 736, 744 (10th Cir. 2013) (emphasis added) (internal quotation marks omitted). And the Ninth Circuit, again under the ADA, has recognized an exception to the requirement that the employee request an accommodation for his disability, under circumstances where the employer knows that the employee has a disability, knows that the employee is having trouble at work due to his disability, and knows, or has reason to know, that the disability prevents the employee from requesting an accommodation. *See Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001). There are, then, exceptions to the general rule that an employer's obligation to consider a reasonable accommodation is not triggered unless and until an employee or job applicant informs the employer of the need for an accommodation.

Even more directly analogous to the situation here, other circuits have held that a job applicant or employee can establish a prima facie religious failure-to-accommodate claim if she can show that the employer knew of a conflict between the plaintiff's religious beliefs and a job requirement, regardless of how the em-

ployer acquired knowledge of that conflict.[7] These cases conclude that "[a]n employer need have 'only

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[7] *See Dixon v. Hallmark Cos.*, 627 F.3d 849, 855-56 (11th Cir. 2010) (rejecting argument that plaintiff employees who operated a property management office had failed to assert a prima facie failure-to-accommodate claim because they did not inform the employer of their specific belief that God should not be removed from public places, where there was ample evidence that their supervisor was already aware that there was a tension between the plaintiffs' religious beliefs and the employer's policy against displaying religious artwork in the employer's property management offices); *Brown v. Polk Cnty.*, 61 F.3d 650, 652-53 (8th Cir. 1995) (rejecting employer's argument that employee never explicitly requested an accommodation of his religious activities because employer was already aware of "the potential for conflict" between the employee's religious activities and the employer's work rules because the employee had previously been reprimanded for his religious activities at work); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361-63 (S.D. Fla. 1999) (holding orthodox Jew who applied for pharmacist position and whose religious beliefs precluded his selling condoms, stated at least a prima facie failure-to-accommodate claim even though the employer discovered this conflict between the applicant's religious beliefs and the job requirements, not from the applicant, but from one of the applicant's job references; noting that "[i]t would be hyper-technical, based on the facts of this case, to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff. The notice requirement is meant in part to allow the company an opportunity to attempt to reasonably accommodate the Plaintiff's beliefs. The [employer] was not deprived of the opportunity to attempt to accommodate the Plaintiff's beliefs merely because the notice did not come from the Plaintiff."); *see also Heller v. EBB Auto Co.*, 8 F.3d 1433, 1436-37, 1439 (9th Cir. 1993) (in addressing claim that car dealership fired one of its salesmen for missing work to attend a ceremony for his wife's conversion to Judaism, rejecting argument that the salesman failed to state a prima facie failure-to-accommodate claim because he did not explain the ceremony sufficiently to his employer; concluding that "[a] sensible approach would require only enough information about an employee's religious needs to permit

enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'" *Brown*, 61 F.3d at 654 (8th Cir.) (quoting *Heller*, 8 F.3d at 1439 (9th Cir.)). I would rely on this principle here. To my mind, once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict in order to determine if there is a reasonable accommodation for the job applicant's religious practices. At that point, the need for accommodation has been put on the table for discussion and the employer, with superior knowledge of its ability to accommodate, can no longer ignore the need to initiate dialogue with the employee regarding reasonable accommodations.

Thus, where, as here, the employer has knowledge of a credible potential conflict between its policies and the job applicant's religious practices, the employer has a duty to inquire into this potential conflict. This duty does not, however, obligate the employer to inquire, open-endedly, about the applicant's religious beliefs and practices. Under the circumstances presented here, Abercrombie only had a duty to disclose to Elauf that its Look Policy prohibited Elauf from wearing any headwear while working in one of Abercrombie's stores, when it had notice of facts that suggested to it the possibility of such a conflict. This inquiry would have been sufficient to initiate any needed dialogue between the job applicant, Elauf, and the em-

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the employer to understand the existence of a conflict between the employee's religious needs and the employer's job requirements").

ployer, Abercrombie, as to whether Elauf had religious beliefs that conflicted with Abercrombie's dress code, beliefs which perhaps would be addressed by an accommodation.[8]

The majority disagrees with the cases from these other circuits (thereby creating a conflict among the circuits) which permit a plaintiff to establish a prima facie failure-to-accommodate claim by establishing that the employer knew, by any means, of a conflict between the plaintiff's religious practices and the employer's work rules. I would follow the holdings in those case but, even without relying on those cases here, the EEOC has still put forth evidence establishing the fourth element of her prima facie claim, that Abercrombie assumed that Elauf was Muslim, that she wore a hijab for religious reasons, and that she would insist on wearing a hijab while working in an Abercrombie store, and then, based on those assumptions and without first initiating any dialogue with Elauf to verify its assumptions, Abercrombie refused to hire Elauf because she wore a hijab. (Aplt. App. at 306-07; Aple. Supp. App. at 48, 51.)

Those facts, if found by a jury, smack of exactly the religious discrimination that Title VII prohibits. And

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[8] This duty is not unlike the duties of inquiry recognized by the law in other contexts, when facts are sufficient to put a party on notice he needs to make inquiry or be held to know the facts which such inquiry would have uncovered. *See TRW Inc. v. Andrews*, 534 U.S. 19, 30, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (in parenthetical to citation for *Stone v. Williams*, 970 F.2d 1043, 1049 (2d Cir. 1992); addressing when statute of limitations begins to run); *see also Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1201-02 (10th Cir. 1998) (addressing when statute of limitations for private securities fraud action began to run).

a jury could further find, from such facts, that Abercrombie, based on its superior knowledge of a possible conflict between Elauf's religious practice and Abercrombie's Look Policy, was able affirmatively to avoid its obligation to engage in an interactive dialogue with Elauf about a reasonable accommodation of Elauf's religious practice by not mentioning the possible conflict and then not hiring her because of it. *See Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 916 (10th Cir. 2004) (noting, in ADA case, that employer's refusal to participate in an interactive process could result in liability); *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1253 (10th Cir. 2004) (noting, in an ADA case, that "[n]either party may create or destroy liability by causing a breakdown of the interactive process").[9] On the record in this particular case, a jury could find Abercrombie liable for violating Title VII's proscription against religious discrimination in employment on this basis. The EEOC, therefore, has established a prima facie failure-to-accommodate claim.

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[9] Other circuits have noted, in addressing this interactive process in the context of reasonable accommodation under the ADA, that an employer can be liable for refusing to participate in good faith in that process:

> [C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, *by way of initiation or response*, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 312 (3d Cir. 1999) (emphasis added) (quoting *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996)).

In conclusion, let me be very clear. I am not suggesting that the employer has a general duty, during a job interview, to give the applicant a comprehensive "laundry list" of all of the employer's work policies in order to determine if those job requirements might possibly conflict with an applicant's unstated religious beliefs or practices. I agree that the burden ordinarily remains with the job applicant to inform the employer of any conflict between the job's requirements and her religious beliefs and practices, because it will usually be the applicant, and not the employer, who knows of such a conflict. However, I am also not suggesting, as the majority appears to be, that a job applicant must initiate a general discussion of her religious beliefs during the job interview just in case her religious beliefs and practices might conflict with some unstated policy or work rule of the employer. The EEOC has shown here that it was the employer, Abercrombie, which had superior knowledge of a possible conflict between its Look Policy and Elauf's apparent religious practice of wearing a hijab. Under those facts, established after viewing the evidence in light most favorable to the EEOC,[10] Abercrombie had

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[10] The facts presented here include the fact that Elauf wore a black hijab to her interview (Aplt. App. at 368), exhibiting the very practice that Abercrombie's Look Policy was ultimately determined to forbid. Further, Abercrombie assumed that Elauf was Muslim, wore the hijab for religious reasons, and would insist on wearing a hijab while working in one of Abercrombie's stores. (*Id.* at 306-07; Aple. Supp. App. at 48.) Abercrombie then acted on those assumptions, without first verifying them with Elauf, when it decided not to hire her. (Aple. Supp. App. at 48, 51.) So this is not a case where the employer can claim to have been blindsided by some objectionable practice of the job applicant that the employer did not realize was religiously based.

a duty to initiate a dialogue with Elauf by informing her that Abercrombie's Look Policy prohibited its sales models from wearing headwear and then inquiring whether she could comply with that policy, or whether Abercrombie could accommodate her belief in some reasonable way. Said another way, a jury could find Abercrombie liable under Title VII for assuming that Elauf was a Muslim who wore a hijab for religious reasons and that she would insist on wearing a hijab while working in one of Abercrombie's stores, and then, without initiating a dialogue with Elauf to verify those assumptions, refused to hire Elauf based upon the company's assumptions.[11]

III. Because Abercrombie's evidence contradicted the EEOC's prima facie evidence, that created a triable issue of fact as to whether Abercrombie failed to accommodate Elauf's religious practice of wearing a hijab; therefore, a jury trial is required

The district court entered summary judgment for the EEOC. The majority reverses that determination and concludes that summary judgment should enter, instead, for Abercrombie. I agree that the EEOC is not entitled to summary judgment because there is conflicting evidence on both sides. However, for the same reason, I dissent from the entry of summary judgment on behalf of Abercrombie. I would, instead, remand for a jury trial because there are factual disputes as to whether the circumstances presented here triggered Abercrombie's duty to initiate an interactive dialogue with Elauf in order to determine whether she

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[11] All of the above could reasonably be inferred from the record in this case, read in the light most favorable to the EEOC on behalf of Elauf.

had a religious practice that conflicted with Abercrombie's Look Policy. In light of these factual disputes, a jury must decide the EEOC's failure-to-accommodate claim asserted on Elauf's behalf. Therefore, I would remand that claim for trial.[12]

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[12] The district court granted the EEOC summary judgment on an alternative basis, holding as a matter of law that Abercrombie had failed to establish that it could not accommodate Elauf's religious practice of wearing a hijab without suffering undue hardship to the conduct of its business. Abercrombie challenges that determination on appeal. Because I conclude there is conflicting evidence as to that issue, as well, I would not affirm the district court's decision to grant summary judgment for the EEOC on that basis.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 09-CV-602-GKF-FHM
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANT

Filed: July 13, 2011

OPINION AND ORDER

GREGORY K. FRIZZELL, District Judge.

This matter is before the court on the Motion for Summary Judgment of defendant Abercrombie & Fitch Stores, Inc. ("Abercrombie") [Dkt. # 50] and the Amended Motion for Partial Summary Judgment of plaintiff, the Equal Employment Opportunity Commission ("EEOC") [Dkt. # 68].

The EEOC brought this action pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(f)(1) & (3)) and Title I of the Civil Rights Act of 1991 (42 U.S.C. § 1981a), alleging religious discrimination against Samantha Elauf ("Elauf"), a Muslim teenager who applied for a job at an Abercrombie store in

Woodland Hills Mall in 2008. [Dkt. # 2]. Abercrombie did not hire Elauf because, as a Muslim, she wears a head scarf and the Abercrombie "Look Policy" prohibits sales models from wearing head wear.

The EEOC seeks summary judgment on the issue of liability or, in the alternative, on one or more elements of its prima facie case and/or on Abercrombie's affirmative defense of undue hardship. Abercrombie contends the EEOC's motion should be denied and its cross motion should be granted because the EEOC has not established a prima facie case, and because an accommodation for Elauf would cause Abercrombie undue hardship.

I. Material Facts

Abercrombie operates retail stores across the country under a variety of brand names, including Abercrombie & Fitch, abercrombie ("Abercrombie Kids") and Hollister. [Dkt. # 86, Defendant's Statement of Facts ¶ 1; Dkt. # 77, Plaintiff's Response to Defendant's Statement of Facts ¶ 1]. The target customer of Abercrombie & Fitch is age 18 to 22 and the target customer of Abercrombie Kids is age 8 to 16. [Dkt. # 50, Supplemented Written Testimony of Dr. Erich A. Joachimsthaler, ¶ 26]. Abercrombie's Vice President of Human Resources, Deon Riley, testified that its largest advertising is its "in store experience with our models (sales associates), the look and feel of the store, what the customer has come to expect." [Dkt. # 86, Ex. 3, Deon Riley Dep., 19:1-5].

In 2008, Abercrombie operated an Abercrombie Kids store in the Woodland Hills Mall in Tulsa, Oklahoma. [Dkt. # 68, Plaintiff's Statement of Facts ¶ 7]. At all times from 2005 to the present, Abercrombie

has required employees in its Abercrombie Kids, Abercrombie & Fitch, and Hollister stores to comply with a "Look Policy." [# 68, Ex. 3, Chad Moorefield Dep., 69:7-17, 102:23-103:16, 149:20-167:5 and Moorefield Dep. Exs. 7, 8, 9; Ex. 7, Riley Dep. 18:5-17]. Kathleen Lundquist, an expert for Abercrombie, has stated that the Look Policy is inherent to a model's role and is a major component of the in-store experience. [# 50, Ex. G, Lundquist Declaration, ¶ 8]. The Look Policy requires employees to dress in clothing and merchandise consistent with that sold in the store; requires that male employees be clean shaven; prohibits female employees from wearing necklaces and bracelets; requires employees to wear specific types of shoes; and prohibits "caps" but does not mention any other head wear. [Dkt. # 68, Ex. 4, Heather Cooke Dep., Ex. 8 thereto, pp. 29-30]. The policy applies to all store employees, but applicants are not required to be in compliance at the time of the interview. [Dkt. # 50, Ex. C, Riley Dep., 63:18-24].

Abercrombie trains store managers "never to assume anything about anyone" in a job interview, and not to ask applicants about their religion. [Dkt. # 68, Ex. 7, Riley Dep., 62:18-63:3]. If there are issues or questions regarding the Look Policy or an employee requests a religious accommodation, the store manager is instructed to contact Abercrombie's Human Resources Department and/or their direct supervisor. [Dkt. # 50, Ex. C., Riley Dep., 32:10-21, 113:2-114:7]. The Human Resources managers have the individual discretion to grant accommodations "as long as it's not going to distract from the brand." [*Id.*, 114:2-7].

Samantha Elauf has been a Muslim since birth. [Dkt. # 68, Ex. 2, Elauf Dep., 28:18-20]. Her parents

are both practicing Muslims. [*Id.*, 29:6-8]. Her mother wears a head scarf on a daily basis [*Id.*, 30:23-31:10], and Elauf began to wear a head scarf[1] at age 13. [*Id.*, 31:14-16]. Since then, she has worn a head scarf at all times when in public or in the presence of male strangers. [*Id.* 32:7-33:5]. She considers it a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty. [*Id.*, 32:2-6;121:22-24; 123:10-21]. She testified that the head scarf becomes an obligation after one reaches puberty, and "that's the only time you'll be able to decide whether or not you want to wear a head scarf." [*Id.*, 34:3-10].

Elauf acknowledged the Quran does not explicitly require women to wear head scarves. [*Id.*, 124:16-25; Ex. 50, Ex. A, Elauf Dep., 125:1-4]. She admitted that someone could be an observant Muslim without wearing a head scarf, and testified that several members of her family, and her friend Farisa Sepahvand, do not wear head scarves, but she does not think they are looked down upon or are not "good Muslims." [*Id.*, 30:8-11; 35:10-21; 45:1-20; 121:2-17].

Elauf fasts during Ramadan and has done so since she was in fifth grade. [*Id.*, 40:21-41:13]. She does not pray five times a day[2] or daily, but prays and reads

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[1] A head scarf is a type of hijab, a head covering common in Islamic cultures. [Dkt. # 68, Ex. 1, John Esposito Dep., 44:1-20]. There are different styles of hijabs. [*Id.*, 47:8-15]. Elauf wears one that does not appear to cover her face, neck or shoulders. [# 68, Ex. 4, Cooke Dep., Exs. 6 and 7 thereto; Ex. 1, Esposito Dep., 47:19-48:4].

[2] Elauf testified that part of the Muslim religion is to pray five times a day. [Dkt. # 68, Elauf Dep., 42:6-16].

verses of the Quran twice a month and also studies the Quran during Ramadan. [*Id.*, 38:12-39:16]. She does not drink, party or gamble, as they are considered "not Islamic." [*Id.*, 38:5-10]. She tries to cover the majority of her arms and legs when she dresses. [*Id.*, 48:6-20].

Elauf "occasionally" attends services at her mosque,[3] the Islamic Center in Tulsa, but said she is not sure where it is located as far as the street name. [Dkt. # 86, Ex. 1, Elauf Dep., 13:2-6].

Elauf's Application and Interview

On June 25, 2008 Elauf, then 17, applied for a job as a model at the Abercrombie Kids store in Woodland Hills Mall. [Dkt. # 68, Ex. 2, Samantha Elauf Dep., 52:4-53:7]. Assistant store manager Heather Cooke interviewed her on June 26, 2008. [*Id.*, Ex. 4, Heather Cooke Dep., Ex. 5 thereto].

As a high school student, Elauf had worked at Woodland Hills Mall in the Fruit Fondue kiosk and the Limited Too store. [Dkt. # 68, Ex. 2, Samantha Elauf Dep., 44:3-17; 54:6-17]. Before she applied for a job at Abercrombie, she had shopped there and bought jeans, sweatshirts, tank tops and t-shirts from its stores. [*Id.*, 49:8-18]. Elauf's friend, Farisa Sepahvand, who worked as a model at Abercrombie

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[3] She estimates she attends two of the weekly Friday prayer services plus two holiday services each year provided she is not working, i.e., four services a year. She testified that it is "not [as] necessary for a woman to go to the Friday prayers as it is for a man." [Dkt. # 86, Ex. 1, Samantha Elauf Dep., 13:25-14:10, 15:5-24].

Kids, encouraged her to apply. [*Id.*, 45:23-46:1;]. Like Elauf, Sepahvand is a Muslim. [*Id.*, 12:12-13].

Elauf was unaware, before she applied, that Abercrombie had a Look Policy. [*Id.*, 59:6-11]. Elauf testified that Sepahvand told her she had discussed with Cooke whether it was okay if Elauf wore a black head scarf, and Cooke said she would probably have to wear a different color. [*Id.*, 57: 7-58:2]. Sepahvand told Elauf she would not be able to wear a head scarf that was black because Abercrombie required models to wear clothing similar to what it sold, and Abercrombie did not sell black clothing. [*Id.*, 56:17-57:12; Ex. 17, Farisa Sepahvand Dep., 32:24-33:24]. Elauf testified she knew Abercrombie does not sell head scarves, although it sold scarves she could wear as head scarves. [# 86, Defendant's Statement of Fact ¶ 5 and Ex. 1, Elauf Dep., 117:4-15].

Elauf testified that during the interview, Cooke never mentioned the Look Policy, but told her she would "wear clothing that either looked like Abercrombie and then the fact that I wasn't supposed to wear heavy makeup or like polish, nail polish." [Dkt. # 86, Ex. 1, Elauf Dep., 65:2-8]. It is undisputed that Cooke did not tell her Abercrombie would not permit models to wear head scarves or to wear black clothing. [*Id.*, 65:15-21; # 68, Ex. 4, Cooke Dep. 98:14-99:1].[4]

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[4] The witnesses' testimony on this subject conflicts to some extent. Elauf was "pretty sure" Cooke told her that "what I was wearing that day would be fine but I would just have to wear a different color scarf because I think I was wearing a black scarf and I was wearing black sandals, and you weren't allowed to wear black shoes . " [*Id.*, Ex. 2, Elauf Dep., 61:23-62:13]. Cooke testified she did not discuss with Elauf the fact that she wore a head scarf

Cooke was responsible for recruiting, interviewing, and hiring new store employees. She supervised models in the store, had the authority to discipline them, and decided which model applicants would receive job offers. She did not usually seek approval from the District Manager before extending a job offer, and the District Manager was usually not involved in deciding whether to hire a specific applicant. [Dkt. # 68, Ex. 4, Cooke Dep., 23:3-16, 27:8-30:18, Ex. 5, Johnson Dep. 34:9-25, 38:17-25; Ex. 3 Moorefield Dep. 141:22-142:6; Ex. 6 Def. Responses to Pl. First Interrogatories, No. 9.].

During the interview with Cooke, Elauf wore an Abercrombie & Fitch like T-shirt and jeans, and a head scarf. [Dkt. # 68, Ex. 4, Cooke Dep., 95:12-96:3; 109:1-8]. Cooke had previously seen Elauf wearing a head scarf in the Woodland Hills Mall. [*Id.*, 96:5-10]. Cooke testified that the head scarf signified to her that Elauf was Muslim and, "I figured that was the religious reason why she wore her head scarf, she was Muslim," [*Id.*, 96:11-15] and "I just assumed that she was Muslim because of the head scarf was for religious reasons." [*Id.*, 153:19-22]. Cooke believed Elauf was a good candidate for the job, but she was unsure, at the time, whether it would be a problem for Elauf to wear the headscarf to work as a model for Abercrombie. [*Id.*, 99:6-16; 109:9-11]. She testified:

> Q: Did you, at that time, feel that she should not be able to work as a model at Abercrombie Kids because she was wearing the head scarf?

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during the interview or tell her should could not wear black if she was hired as a model. [# 68, Ex. 4, Cooke Dep., 98:14-99:1].

A: No. I did not feel. I felt like she could. I didn't feel like there was anything wrong with it. But I knew that in—not in this, but in the Employee Handbook, it does say that we're not supposed to wear the color black. But they had just said we could wear black converse tennis shoes. So I was a little unclear.

And I think it says in the handbook you can't wear hats. So I was unclear. So that's why—I was the assistant manager and that's why I asked the store manager and the district manager.

[*Id.*, 99:17-100:9].

The store manager was unable to answer Cooke's question about head scarves, so she consulted with her District Manager, Randall Johnson. [*Id.*, 106:24-107:8]. She testified Johnson told her not to hire Elauf because she wore the head scarf, that employees were not allowed to wear hats at work, and that if Elauf wore the head scarf, then other associates would think they could wear hats at work. [*Id.*, 107:8-12]. Cooke further testified:

Q: And did you—did you discuss it with him in sort of—did you have any discussion with him over this?

A: Yes, I did. I thought she was a very good candidate to work here. And I asked him, you know, she wears the head scarf for religious reasons, I believe. And he said, "You still can't hire her because someone can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them.

> And I told him that I believed that she was Muslim, and that was a recognized religion. And that she was wearing it for religious reasons. And I believe that we should hire her.
>
> Q: And what did he say?
>
> A: He told me not to hire her.

[*Id.*, 107:14-108:5].

In his deposition, Johnson denied Cooke told him Elauf wore the head scarf for religious reasons and also denied making the remark about people painting themselves green. [Dkt. # 68, Ex. 5, Randall Johnson Dep., 86:4-21].

Johnson testified that Abercrombie's Human Resources Department is responsible for compliance with the Look Policy, and if he had a question whether a head scarf was the same as a cap, he would have called his HR manager. [*Id.*, 48:24-49:10]. However, he believed the head scarf would not have complied with the Look Policy. [*Id.*, 48:20-23]. He testified that during the time he was district manager, the Abercrombie Kids store had never had any exception to the Look policy. [*Id.*, 69:15-21]. He was not aware Abercrombie allowed any exceptions nationwide from 2001 to 2009. [*Id.*, 70:25-71:12]. He was unaware that in other stores, Abercrombie had allowed store models to wear a yarmulke. [*Id.*, 71:9-12]. In his opinion, there was no difference between a yarmulke, a head scarf, "[o]r a ball cap or a helmet for all that matters. It's still a cap," and if an applicant asked to wear a ball cap for religious reasons, he "[s]till would have denied them, yes, sir." [*Id.*, 71:13-72:3].

Johnson testified that the process for considering a request for an exception would be that he would contact his HR director, "and they would make that exception or determination if we could hire them or go forward with that applicant." [*Id.*, 72:4-14]. He stated that he had "never had to make an exception, no, or make-or call HR to make an exception." [*Id.*, 72:15-20].

Johnson knew that some Muslim women wear head scarves because he had seen them on television. [*Id.*, 47:23-25]. Viewing photographs of Elauf, he stated that she would have been a good candidate to hire as a model except for the head scarf. [*Id.*, 70:15-18].

Johnson could not recall if he asked Cooke whether Elauf could remove her head scarf. [*Id.*, 50:13-18]. He did not recall any discussion about how Elauf could comply with the Look Policy if hired. [*Id.*, 51:20-23].

During her interview of Elauf, Cooke had filled out a Model Group Interview Guide rating sheet, rating Elauf on three "competencies" required for the job of model: "outgoing and promotes diversity," "sophistication and aspiration," and "appearance and sense of style." [Dkt. # 68, Ex. 4, Cooke Dep., 104:10-105:7]. A candidate who scores below a total combined score of 6 is classified as "below expectations" and not recommended for hiring. [# 68, Ex. 4, Cooke Ep., Ex. 5 thereto at A & F001997].

Originally, Cooke gave Elauf a "2" (on a scale of 1-3, with 3 being the highest) in all three competencies. [*Id.*, 104:15-105:23]. She also originally marked the "hiring recommendation" as "recommend." [*Id.*, 106:17-23]. She testified that when Johnson told her not to hire Elauf, "he told me to give her a 1 on appearance, so then her

score would be a 5 instead of a 6, and I would not hire her." [*Id.*, 122:13-25]. After Cooke consulted Johnson, she threw away Elauf's original rating sheet and filled out a new one, changing Elauf's score on "Appearance and Sense of Style" from 2 to 1. [*Id.*, 123:1-19]. After she changed the rating, Cooke did not extend a job offer to Elauf. [# 68, Plaintiff's Statement of Facts ¶ 22].

Elauf testified that, at the end of her interview, Cooke told her she would call her the next day or the day after and let her know when orientation was. [Dkt. # 68, Ex. 2, Elauf Dep., 66:1-5]. Elauf never got a call, and her friend Farisa told her three days after the interview that the district manager had told Cooke not to hire her because of the head scarf. [*Id.*, Ex. 2, Elauf Dep., 66:13-67:13].

Look Policy Exceptions

Requests for exceptions to the Look Policy must be approved by Abercrombie's Human Resources Department in corporate headquarters. [# 68, Ex. 7, Riley Dep., 109:5-110:19]. Riley testified that exceptions to the Look Policy are recorded in the Human Resources contact records database, but Abercrombie has not tracked the exceptions or measured whether they have had any negative impact on how customers view the Abercrombie style. [*Id.*, 129:4-24].

In 2006, Abercrombie's Human Resources Department approved a head scarf exception to the Look Policy. [Dkt. # 68, Ex. 7, unnumbered exhibit thereto, Contact Records, A & F004313]. Additionally, since 2006, the department has approved the following exemptions to the Look Policy: allowing males to work with facial hair for religious and medical reasons;

allowing females to wear bracelets for religious reasons; allowing female employees to wear long skirts inconsistent with skirts sold in the stores for religious reasons; and allowing males to wear yarmulkes for religious reasons. [# 68, Plaintiff's Statement of Facts ¶ 35, Ex. 3, Moorefield Dep. 262:22-264:4; Ex. 13, HR Contact Records; Ex. 14, Defendant's Supp. Resp. To Pl.'s First Request for Admissions, Nos. 15 and 16; Ex. 7, Riley Dep., 92:17-93:11; 101:20-23; 139:12-140:13; 158:6-138:3, Riley Dep. Exs. 25-26].

Subsequent to its rejection of Elauf's application, Abercrombie began to allow more head scarf exceptions. [# 68, Ex. 7, Riley Dep., 92: 17:24; 236:1-6]. In an interview reported by the New York Times (online) on September 23, 2010, Abercrombie's General Counsel Ronald A. Robins, Jr., said that Abercrombie "makes every reasonable attempt to accommodate the religious practices of associates and applicants, including, where appropriate, allowing associates to wear a hijab." [*Id.*, Ex. 15, N.Y. Times.com article; Ex. 12, Defendant's Response to Requests for Admission §§ 1-2]. Abercrombie's Vice President of Human Resources, Deon Riley, testified Abercrombie now allows exceptions to the policy against headwear and, with respect to the head scarf, has allowed eight or nine exceptions. [# 68, Ex. 7, Riley Dep., 236:1-6].

Abercrombie executives uniformly testified that allowing exceptions to the Look Policy has a negative impact on the brand and on sales. Riley testified she believes the Look Policy leads to a better in-store experience and more repeat customers and the in-store experience "is a core driver of our business." [# 50, Ex. C., Riley Dep., 31:13-32:]. However, she also admitted that the report of Dr. Erich A. Joachimsthaler,

Abercrombie's expert in this case, is the only study or analysis Abercrombie has conducted in the last two years on the effect of a Look Policy exemption, and Riley's department has not been asked to assess whether or how deviations impact customer views or to review sales for that purpose. [Dkt. # 68, Ex. 7, Riley Dep., 13:9-16:4; Ex. 8, Def. Supp. Answers to Pl. First Interrogatories, No. 5].

A store's compliance with the Look Policy is tracked by the Director of Stores and the Regional Managers through ratings on store audits and in Secret Shopper reports. [# 68, Plaintiff's Statement of Facts ¶ 28, Ex. 3, Chad Moorefield Dep., 170:2-173:15]. Chad Moorefield, Director of Stores for Abercrombie, testified that he never did any empirical analysis to determine if a drop in store audit scores is correlated to a drop in sales for any store [*Id.*, 195:1-199:20], although he has "seen stores or managers that do a poor job of enforcing our Look Policy and ha[s] seen low sales scores because of it." [*Id.*, 218:1-9].

Human Resources Director Amy Yoakum testified she believes that granting an exception for Elauf would have created an undue burden because it could negatively affect the "store experience" for Abercrombie's customers and the uniform enforcement of the Look Policy. [Dkt. # 68, Ex. 11, Yoakum Dep. 62:16-63:23; 68:16-69:2]. In her deposition on March 18, 2011, she was not aware that Abercrombie had, since the Elauf incident, granted eight or nine exceptions for head scarves, but stated that knowledge would not change her opinion. [*Id.*, 65:2-10]. Yoakum was not aware of any study to measure the impact of Look Policy deviations. [*Id.*, 68:8-15].

Abercrombie's expert, Lundquist, testified that she created the job description for the model position that was in effect in 2008. [# 50, Ex. G., Kathleen K. Lundquist Decl., ¶ 7]. She stated that an essential function of the job as an Abercrombie model is to "act as a model for the brand," and in so doing "represent the [Abercrombie] brands in their appearance and sense of style." [*Id.*, ¶ 8]. She opined that "it is both critical to the job and an essential function of the job of Model at Abercrombie to maintain an appearance and sense of style consistent with the brand" and "critical to comply with standards of conduct including the Look Policy." [*Id.*, ¶ 23]. Lundquist has not performed any study or read any report regarding the impact of any store not being in compliance with the Look Policy and/or its impact on the brand. [Dkt. # 68, Ex. 10, Kathleen Lundquist Dep., 135:10-18].

Abercrombie relies on the Joachimsthaler report in support of its position that an exception would create an undue burden. [*Id.*, Ex. 8, Def. Supp. Answers to Pl. First Interrogatories, No. 5]. Abercrombie has not assigned a specific financial value to the alleged undue burden. [*Id.*].

Joachimsthaler testified regarding marketing strategy and brands. [Dkt. # 50, Ex. F., Joachimsthaler Written Testimony; Dkt. # 68, Ex. 9, Erich Joachimsthaler Dep.]. The declaration and deposition of Joachimsthaler establish:

- Abercrombie does not use television advertising and uses only minimal print advertising, and that its "brand identity" is communicated through the "in-store brand experience," including interactions

with employees. [Dkt. # 50, Ex. F. Joachimsthaler Dec., ¶ 11(ii)].

• Abercrombie's Look Policy plays a critical role in "communicating the overall brand experience and desired brand image to consumers" because "it ensures consistent and positive portrayals of the Abercrombie brand in the important in-store environment." [*Id.*, ¶ 11(iii)].

• "An employee's look or dress that is contrary to the guidelines of the Look Policy is identity distorting and would appear visibly 'off-brand' to the Abercrombie target, and negatively impact Abercrombie's ability to communicate a consistent 'on brand' experience to its target customers," and "[t]here is potential to cause consumer confusion and decrease brand preference and value perceptions for the Abercrombie brand," including "a decreased ability to effectively market to its target and establish strong emotional bonds with them; a decreased ability to retain exiting customer; and increased costs of marketing and merchandising its products successfully." [*Id.*, ¶ 11(iv)].

• Joachimsthaler was aware that Abercrombie's Human Resources Department has approved exceptions to the Look Policy for head scarves. He knows of no studies done by Abercrombie to determine if allowing employees to wear headscarves has resulted in lost sales. He has not done such a study himself. [# 168, Ex. 9, Joachimsthaler Dep., 187:8-22].

• When asked to "square" his opinion that allowing models to wear head scarves could cause a negative impact on the brand with the fact that

Abercrombie now allows exceptions to the policy to permit wearing of the head scarf, Joachimsthaler opined that the exceptions "still negatively impact the brand." [*Id.*, 147:22-24].

II. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden to show that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

The non-moving party must set forth facts sufficient to establish the existence of a genuine issue for trial. *Rocky Mountain Rogues, Inc. v. Town of Alpine*, 375 Fed. Appx. 887, 891 (10th Cir. 2010). Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The mere existence of "a scintilla of evidence" in support of the non-moving party's position is insufficient. *Id.* To survive a motion for summary judgment, the non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. 2548.

The court must "view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury." *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1402 (10th Cir. 1997) (quoting *Williams v. Rice*, 983 F.2d 177, 179 (10th Cir. 1993)).

III. Analysis

Title VII makes it "an unlawful employment practice for an employer to discharge any individual, or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's religion." 42 U.S.C. § 2000e-2(a)(1). "Religion" is defined to include only those "aspects of religious observance and practice" that an employer is able to "reasonably accommodate without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Title VII imposes an obligation on the employer "to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. § 1605.2(b)(1), (2).

On summary judgment, the principles outlined above are applied using the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). First, the plaintiff initially bears the burden of production with respect to a prima facie case by showing that (1) she had a bona fide religious belief that conflicts with an employment requirement; (2) she informed the employer of this belief; and (3) she was not

hired for failing to comply with the employment requirement. *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000). The burden then shifts to the defendant, who must: "(1) conclusively rebut one or more elements of the plaintiff's prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable to accommodate the employee's religious needs reasonably without undue hardship." *Id.* at 1156 (emphasis added).[5]

A. Prima Facie Case

The EEOC introduced evidence that Elauf wears a head scarf based on her belief that the Quran requires her to do so, and that this belief conflicts with Abercrombie's prohibition against headwear;[6] that Abercrombie had notice she wore a head scarf because of her religious belief; and that it refused to hire her

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[5] The court in *Thomas* explained that the burden shifting approach is different in ADA and religious discrimination cases than in other types of discrimination cases:

> In [an ADA or religious failure to accommodate] case, the Congress has already determined that a failure to offer a reasonable accommodation to an otherwise qualified disabled employee *is* unlawful discrimination. Thus, we use the burden-shifting mechanism, not to probe the subjective intent of the employer, but rather simply to provide a useful structure by which the district court, when considering a motion for summary judgment, can determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered.

225 F.3d at 1155.

[6] The Look Policy prohibits the wearing of "caps" on the sales floor.

because the head scarf conflicted with its Look Policy. Thus, plaintiff has established a prima facie case.

B. Rebuttal of Prima Facie Case

Abercrombie challenges two elements of the prima facie case, asserting Elauf's wearing of the head scarf is not based on a bona fide religious belief and the notice requirement was not satisfied.

1. Bona Fide Religious Belief

A "bona fide religious belief" is one that (1) is religious within the plaintiff's own scheme of things, and (2) is sincerely held. *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965). As long as a party's beliefs are religiously based, it is not for the courts to inquire whether those beliefs "derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 n.9, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987). Thus, the individual's assertion "that [her] belief is an essential part of a religious faith must be given great weight." *Seeger*, 380 U.S. at 184, 85 S. Ct. 850. Courts may not engage in an extensive inquiry into the religious beliefs of the plaintiff in order to determine whether religion mandates the employee's adherence. *See Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993), citing *Fowler v. State of R.I.*, 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953). The Supreme Court has stated, "[I]t is no business of courts to say what is a religious practice or activity." *Fowler v. Rhode Island*, 345 U.S. 67, 70, 73 S. Ct. 526, 97 L. Ed. 828 (1953).

a. Whether Elauf Wears a Scarf Based on a Religious Belief

Citing testimony of an expert witness for the EEOC, John Esposito, Abercrombie suggests Elauf wears a head scarf for cultural reasons rather than because of a religious belief.[7] Elauf, though, testified that she considers the head scarf to be a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty. Indeed, the record is devoid of evidence that *her* decision to don a head scarf at age 13 and continue to wear it to this time is based on anything *other* than her religious belief.

Abercrombie also asserts that since the Quran does not explicitly state that women must wear head scarves, Elauf's belief is not a religious belief. However, the broad definition of "religion" does not require that a belief have a textual basis. In *Redmond v. GAF Corporation*, 574 F.2d 897, 900 (7th Cir. 1978), the court held that the protection of Title VII is not limited to situations involving "a practice specifically mandated or prohibited by a tenet of the plaintiff's religion." The court explained:

> First, we note that the very words of the statute ("all aspects of religious observance and practice ") leave little room for such a limited interpretation. Secondly, we note that to restrict the act to those practices which are mandated or prohibited by a tenet of the religion, would involve the court in determining not only what are the tenets

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[7] Esposito an expert on Islam and the Muslim faith, testified generally that head scarfs can be worn for many different reasons. including cultural, religious or nationalistic reasons. [Dkt. # 86, Ex. 8, John Esposito Dep., 41:9-21, 53:4-8]

> of a particular religion, which by itself perhaps would not be beyond the province of the court, but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion. We find such a judicial determination to be irreconcilable with the warning issued by the Supreme Court in *Fowler v. Rhode Island*, 345 U.S. 67, 70, 73 S. Ct. 526, 527, 97 L. Ed. 828 (1953), "(I)t is no business of courts to say what is a religious practice or activity."

Id.

Here, Elauf acknowledged that the Quran does not directly command women to wear head scarves, that some of her friends and family members do not do so, and that she does not consider them to be bad Muslims. However, based upon the Quran's teaching that women must display modesty, Elauf believes *she* should wear a head scarf, and she has done so since puberty at age 13. Heeding the cautionary language of *Fowler*, the court finds that Elauf wears a head scarf based on her religious belief.

b. Whether Elauf's Belief is Sincerely Held

Abercrombie also challenges the sincerity of Elauf's religious belief because she did not know the street address of her mosque, does not regularly attend Friday services, and does not pray five times a day or every day.

As the Second Circuit Court of Appeals has observed, "[I]t is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone's reli-

gious beliefs in the Title VII context." *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2nd Cir. 1985). "[T]he sincerity of [a claimant's] religious beliefs is relevant to *whether or not the observance or practice for which an accommodation was requested* will be considered 'religious' in nature." *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997) (emphasis added).

The court in *Philbrook* stated, "[A] sincerity analysis is necessary in order to differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Id.* at 482. The court further instructed:

> In *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (citations omitted), we outlined several factors that indicated insincerity, noting that "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." The *Barber* court also stated that "the religion's size and history" is relevant to the sincerity determination. *Id.* The burden on plaintiff, however, is not a heavy one. We must avoid any test that might turn on "the fact-finder's own idea of what a religion should resemble" L. Tribe, *supra*, at 861.

Id.

Citing *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto*

Rico, 279 F.3d 49 (1st Cir. 2002),[8] Abercrombie argues the issue of Elauf's sincerity is one of credibility and therefore must be submitted to a jury. The court agrees that the sincerity of a Title VII claimant's religious belief goes to credibility. However, as stated in *Ilona*, *supra*, this court's focus must be on the sincerity of Elauf's belief that she must wear a head scarf-not whether she observed all tenets of the Muslim faith-because it was her belief about head scarves that required accommodation. And the *purpose* of the inquiry, according to *Philbrook*, *supra*, is whether this belief is held as a matter of conscience or instead, animated by motives of deception and fraud.

The record is devoid of *any* evidence Elauf's belief is animated by motives of deception and fraud. To the contrary, the type of inquiry suggested in *Philbrook* shows that Elauf has, since age 13, worn the head scarf consistently and continuously when in public or in the presence of men who are strangers—this despite the fact that she resides in Tulsa, Oklahoma, and is a fashion conscious young woman. There is no evidence Elauf has sought or received financial gain by wearing the head scarf. Finally, the Muslim practice of wearing a head scarf is neither new nor uncommon.

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[8] In *Union Independiente*, the EEOC brought an action on behalf of a member of the Seventh-Day Adventist Church who claimed "the tenets of his religion" prohibited him from joining a labor organization. 279 F.3d at 51. The appellate court found the district court erred because the union had presented evidence of "conduct on [claimant's] part that is contrary to the tents of his professed religious belief." *Id.* at 56. In this case, the religious belief is much more narrowly framed because the *sole* belief asserted is Elauf's belief that she must wear a head scarf.

There being no genuine dispute that Elauf wears a head scarf because of a bona fide religious belief, the court finds Abercrombie has not rebutted this element of plaintiff's prima facie case.

2. Notice

Citing *Thomas*, Abercrombie argues that since Elauf did not tell the interviewer she had a religious belief that conflicted with the Look Policy and that she needed an accommodation, the notice element of the prima facie case has not been satisfied.[9] The EEOC urges a less restrictive approach, asserting that although Abercrombie is required to have had notice that Elauf needed an accommodation, the notice need not have been strictly in the form of Elauf verbally requesting such an accommodation.

Courts in other circuits have held that the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job. *See Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir. 1995) ("It would be hyper-technical to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff"); *Heller*, 8 F.3d at 1439 (9th Cir. 1993); *Hellinger v. Eckerd Corp.*, 67 F Supp. 2d 1359, 1361 (S.D. Fla.1999).

While the Tenth Circuit has not addressed the question of whether notice must be explicitly request-

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[9] In *Thomas*, it was undisputed that plaintiff, a postal employee, had explicitly requested five religious accommodations. *Id.* at 1156. Thus, the adequacy of notice was not at issue.

ed by the employee, the court in *Thomas* discussed at some length the reason notice was essential to the interactive process of accommodation:

> This statutory and regulatory framework, like the statutory and regulatory of the Americans with Disabilities Act (ADA), involves an interactive process that requires participation by both the employer and the employee. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69, 107 S. Ct. 367, 93 L. Ed. 2d 305 [(1986)] (stating that, consistent with the goals expressed in the legislative history of the religious accommodation provision, "Courts have noted that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business") (internal quotations and citations omitted); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) ("Although the burden is on the employer to accommodate the employee's religious needs, the employee must make some effort to cooperative with an employer's attempt at accommodation."); *cf. Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171-72 (10th Cir. 1999) (en banc) (discussing the interactive process between an employer and an employee under the ADA).

Id. at 1155.

In *Smith v. Midland Brake, Inc.*, the Tenth Circuit stated:

> In general, the interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability and resulting limitations, and expressing a desire for reassign-

> ment if no reasonable accommodation is possible in the employee's existing job.

180 F.3d at 1171-72. In a footnote, the court, citing *Beck v. University of Wisconsin*, 75 F.3d 1130, 1134 (7th Cir. 1996), stated:

> An employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations-a duty dictated by common sense *lest a disabled employee keep his disability a secret and sue later for failure to accommodate.*

Id., n. 9 (emphasis added).

These cases teach that the purpose of the notice requirement is to facilitate the interactive process and prevent ambush of an unwitting employer. Thus, faced with the issue of whether the employee must explicitly request an accommodation or whether it is enough that the employer has notice an accommodation is needed—the Tenth Circuit would likely opt for the latter choice.

In this case, it is undisputed that Elauf wore her head scarf at the interview with assistant store manager Heather Cooke, and Cooke knew she wore the head scarf based on her religious belief. Because Cooke was uncertain whether Elauf would need an accommodation, she consulted the District Manager.[10]

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[10] Abercrombie argues an issue of fact exists as to whether Cooke told the District Manager, Randall Johnson, that Elauf wore a head scarf for religious reasons. This is not, however, a material fact issue, because the knowledge of Cooke—who had responsibility for hiring decisions at the Abercrombie Kids store—is attributable to Abercrombie.

Thus, Abercrombie has failed to rebut the second element of the prima facie case—that the employer had notice that Elauf wore a head scarf based on her religious belief.[11]

C. Undue Hardship

Abercrombie asserts that even if it has not rebutted the prima facie case, allowing Elauf to wear a head scarf would result in "undue hardship."

An employer must prevail as a matter of law if the employer cannot reasonably accommodate the employee's religious beliefs without "undue hardship on the conduct of the employer's business." *Lee v. ABF Freight Sys.*, 22 F.3d 1019, 1022 (10th Cir. 1994). An accommodation which results in "more than a *de minimus* cost" is an undue hardship to the employer and the employer need not provide the accommodation. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977).

Several Abercrombie executives have testified they believe granting Elauf an exception to the Look Policy would negatively impact the brand, sales and compliance. However, none have conducted any studies or cite specific examples to support this opinion. Instead, Abercrombie relies on Joachimsthaler's expert opinion.

Joachimsthaler, in turn, testified extensively about the importance of the in-store experience to Aber-

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[11] Under the uncontested facts in this case, there could be no bilateral, interactive process of accommodation because, although Abercrombie was on notice that Elauf wore a head scarf for religious reasons, it denied Elauf's application for employment without informing her she was not being hired or telling her why.

crombie's marketing strategy, and opined that the granting of even one exception to the Look Policy would negatively impact the brand. He has made no effort, however, to collect or analyze data to corroborate his opinion. If Abercrombie had never granted exceptions, or perhaps even if it had never granted exceptions for head scarfs, this omission might be understandable. Eight or nine head scarf exceptions, though, *have* been made, and the expert has completely failed to consider the impact, if any, of those exceptions.

The Tenth Circuit has stated:

> An accommodation that requires an employer to bear more than a "de minimis" burden imposes undue hardship. Any proffered hardship, however, must be actual; [a]n employer cannot rely merely on speculation. A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardship The *magnitude* as well as the *fact* of hardship must be determined by examination of the facts of each case.

Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989). In light of the fact that Abercrombie has granted numerous exceptions to the Look Policy since 2001, and in particular has recently granted eight or nine head scarf exceptions, Joachimsthaler's opinion is too speculative to establish actual hardship, as required by *Toledo*.

Abercrombie has failed to meet its burden of establishing that granting Elauf an exception to the Look Policy would have caused undue hardship.[12]

IV. Conclusion

There being no genuine dispute as to any material fact, Abercrombie's Motion for Summary Judgment [Dkt. # 50] is denied and the EEOC's Amended Motion for Partial Summary Judgment [Dkt. # 68] as to liability is granted.

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[12] Abercrombie may be able to show undue hardship in other hijab cases, but it has not done so here.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-5110

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

ABERCROMBIE & FITCH, AN OHIO
CORPORATION, D/B/A ABERCROMBIE KIDS,
DEFENDANT-APPELLANT

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,
ET AL., MOVANTS

[Filed: Feb. 26, 2014]

ORDER

Before: BRISCOE, Chief Judge, KELLY, LUCERO, HARTZ, TYMKOVICH, GORSUCH, HOLMES, MATHESON, BACHARACH and PHILLIPS, Circuit Judges.

This matter is before the court on appellee's *Petition for Rehearing En Banc*. We also have a response from the appellant. In addition, before us are two proposed amicus curiae briefs from the National Em-

ployment Lawyers' Association and the General Conference of Seventh-Day Adventists, et al. As an initial matter, we grant the request of the proposed amicus parties to file briefs on rehearing. *See* 10th Cir. R. 29.1.

The implicit request for panel rehearing found in the appellee's petition is denied by a majority of the panel which heard this case originally. Judge David Ebel would grant panel rehearing.

The petition was also transmitted to all of the judges of the court who are in regular active service. A poll was requested and the active judges split evenly on whether to grant the en banc request. Accordingly, the petition for en banc consideration is denied. *See* Fed. R. App. P. 35(a) (noting a majority of the active judges may order en banc rehearing). Chief Judge Briscoe, as well as Judges Lucero, Matheson, Bacharach and Phillips voted to grant en banc rehearing. Judge Hartz has written separately.

Entered for the Court

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER
Clerk of Court

No. 11-5110, *EEOC v. Abercrombie & Fitch*

HARTZ, J., writing separately.

The question before the court is whether to review en banc the panel's determination that the EEOC did not present a prima facie case. Although I vote to deny en banc review, I believe the panel (bound by circuit precedent) did make a fundamental error. In the posture of this case (after Abercrombie & Fitch presented its evidence that it should prevail even if the EEOC had presented a prima facie case), it is irrelevant whether the EEOC presented a prima facie case. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). Although *Aikens* concerned review after trial, I see no reason why its analysis would not apply equally to review of a summary judgment. *See Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1226-28 (10th Cir. 2003) (Hartz, J. , concurring); *see also* Timothy M. Tymkovich, *The Problem With Pretext*, 85 Denv. U. L. Rev. 503 (2008).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-5110
(D.C. No. 4:09-CV-00602-GKF-FHM)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS,
DEFENDANT-APPELLANT

[Filed: Oct. 1, 2013]

JUDGMENT

Before: **KELLY**, **EBEL**, and **HOLMES**, Circuit Judges.

This case originated in the Northern District of Oklahoma and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the Northern District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

1. 42 U.S.C. 2000e provides in pertinent part:

Definitions

For the purpose of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

* * * * *

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

* * * * *

2. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

3. 29 C.F.R. 1605.1 provides:

"Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This

standard was developed in *United States* v. *Seeger*, 380 U.S. 163 (1965) and *Welsh* v. *United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.[1] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

4. 29 C.F.R. 1605.2 provides in pertinent part:

Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.

(a) *Purpose of this section.* This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (section 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. Thi section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommo-

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[1] See CD 76-104 (1976), CCH ¶ 6500; CD 71-2620 (1971), CCH ¶ 6283; CD 71-779 (1970), CCH ¶ 6180.

dation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to accommodate.* (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

* * * * *

(c) *Reasonable accommodation.* (1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

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[2] *See Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) *Alternatives for accommodating religious practices.* (1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also

employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations

should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[3]

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

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[3] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. L. 95-390, 5 U.S.C. 5550a "Compensatory Time Off for Religious Observances."

(e) *Undue hardship.* (1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost" [4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny

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[4] *Hardison, supra*, 432 U.S. at 84.

another employee his or her job or shift preference guaranteed by that system. *Hardison, supra*, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute and undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer an a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

5. 29 C.F.R. 1605.3 provides:

Selection practices

(a) *Scheduling of tests or other selection procedures.* When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) *Inquiries which determine an applicant's availability to work during an employer's scheduled working hours.* (1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation

is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

RECORD
AND
BRIEFS

No. 14-86

Supreme Court, U.S.
FILED
AUG 27 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK A. KNUEVE
Counsel of Record
DANIEL J. CLARK
VORYS, SATER, SEYMOUR
AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-6387
Fax: (614) 719-4808
maknueve@vorys.com
Attorneys for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED BY RESPONDENT

The Question Presented by Petitioner is not premised upon the actual factual findings below and exaggerates the question presented by this case. Accordingly, Respondent identifies the appropriate Question Presented as follows:

Whether an applicant adequately informs a prospective employer of the need for a religious accommodation under Title VII simply by wearing an item of clothing which can be but is not always associated with a particular religion.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Abercrombie & Fitch Stores, Inc. ("Abercrombie") discloses that its parent corporation is Abercrombie & Fitch Co., which is a publicly traded company. No other publicly-held corporations own 10% or more of Abercrombie's stock.

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STATEMENT

Petitioner's statement of the Question Presented to this Court exaggerates the significance of the holding of the Court of Appeals for the Tenth Circuit by claiming that the question presented is whether an employer who has "actual knowledge" of a conflict between a job applicant's compulsory religious practice and an employment requirement must accommodate the practice under Title VII of the Civil Rights Act of 1964 only when that knowledge comes "from direct, explicit notice from the applicant." Petition, at (i). However, the employer in this case, Respondent Abercrombie & Fitch Stores, Inc., did *not* have actual knowledge of a religious conflict from *any* source. The EEOC's Petition attempts to avoid the obvious legal consequence of this basic factual finding made below based upon undisputed testimony. Given the factual record, this case is simply not the proper vehicle for the EEOC to advance the legal question presented in the Petition.

The true issue presented is whether an applicant adequately informs a prospective employer of the need for a religious accommodation under Title VII simply by wearing an item of clothing which can be but is not always associated with a particular religion. Every circuit court that has addressed this issue has confirmed that more is required of an applicant before an obligation will be imposed on the prospective employer to provide an accommodation. Indeed, the EEOC's own regulations and guidance require an

applicant to inform the employer of a conflict between a religious belief and a requirement of employment.

Because there are no conflicts among the decisions of the United States circuit courts on this question, and the decision by the Tenth Circuit Court of Appeals in the present case does not conflict with any decisions of this Court, the Petition for a Writ of Certiorari should be denied.

A. Factual Background

Samantha Elauf applied for a Model position at the Abercrombie Kids clothing store in the Woodland Hills Mall in Tulsa, Oklahoma, at the suggestion of a friend, Farisa Sepahvand, who worked at the store. Pet. App. 5a.[1] In Abercrombie stores the Model position is a part-time position analogous to sales associate positions in other stores, except that Abercrombie Models are expected to model the Abercrombie style to customers. Pet. App. 3a. Ms. Sepahvand told Ms. Elauf that the Abercrombie store had a "Look Policy" that prohibited black clothing and required Models to wear clothing styles similar to the clothing sold at the store. *Id.*

Abercrombie expends substantial effort to ensure its customers receive a consistent brand-based, sensory experience in its stores. Pet. App. 3a. Abercrombie

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[1] "Pet. App." refers to the appendix to the petition for certiorari submitted by Petitioner EEOC.

does little or no advertising and the strength of its brand is based on adherence to the Look Policy. Pet. App. 3a-4a. An Abercrombie Model who violates the Look Policy by wearing inconsistent or distracting clothing "inaccurately represents the brand, causes consumer confusion, fails to perform an essential function of the position and ultimately damages the brand." Pet. App. 4a. Accordingly, Abercrombie's interview guide for Models requires managers to consider an applicant's "appearance and sense of style." Pet. App. 8a.

Ms. Elauf testified that she is a practicing Muslim and has worn a headscarf since she was thirteen years old for religious reasons. Pet. App. 5a. Dr. John L. Esposito, an expert on Islam retained by the EEOC, testified that although some religious scholars believe that the Quran – the sacred scripture of the Islamic faith – requires women to wear a headscarf, there are many who disagree with this interpretation. *Id.* Dr. Esposito testified that some Muslim women do not believe that wearing a headscarf is obligatory, and other Muslim women wear headscarves for many reasons other than religious beliefs, including personal or cultural reasons. Pet. App. 2a, 5a-6a. Dr. Esposito testified that the reason a woman wears a headscarf would "really depend on the woman." *Id.*

Abercrombie instructs its managers not to assume facts about prospective employees in a job interview and not to ask applicants about their religion. Pet. App. 4a. If, during an interview, a

prospective employee requests a deviation from the Look Policy, Abercrombie instructs its managers to contact their direct supervisor or Abercrombie's corporate human resources department ("HR"). *Id.* HR managers may grant accommodations if doing so would not harm the brand. *Id.*

Ms. Elauf interviewed for the Model position with Heather Cooke, a 23-year-old assistant manager. Pet. App. 7a. Before her interview, Ms. Elauf knew the position required her to model the Abercrombie style; knew the style of clothing that Abercrombie sold; and also knew that Abercrombie did not sell headscarves. *Id.* Ms. Elauf had been cautioned not to wear black clothing to the interview but nonetheless wore a black headscarf even though she held no religious belief that required her to wear black. Pet. App. 3a, 5a-7a.

It is undisputed that Ms. Cooke "did not know" that Ms. Elauf was Muslim or that Ms. Elauf believed her religion required her to wear a headscarf. Pet. App. 7a. Rather, Ms. Cooke "just assumed that she was Muslim because of the headscarf." *Id.* Ms. Cooke followed a scripted interview guide prepared by Abercrombie and, consistent with the training she received from Abercrombie, did not ask anything about Ms. Elauf's religion. Pet. App. 4a, 8a.

During the interview, Ms. Elauf did not inform Ms. Cooke that she was Muslim, that she wore a headscarf for religious reasons, or that she was obligated by her religious beliefs to wear the headscarf at

work. Pet. App. 7a. Ms. Cooke described some of the Company's dress requirements for Model as set forth in the Look Policy and then asked Ms. Elauf if she had any questions. Ms. Elauf asked no questions. Pet. App. 8a.

Ms. Cooke was unsure about the black headscarf under the Look Policy, so she asked the district manager, Randall Johnson. Pet. App. 8a. Mr. Johnson told Ms. Cooke that under the Look Policy, models were not allowed to wear hats at work. At Mr. Johnson's instruction, Ms. Cooke rated Ms. Elauf as a "1" out of 3 in the "appearance and sense of style" category, which resulted in Ms. Elauf not being offered the Model position. Pet. App. 9a.

B. Proceedings Below

Petitioner Equal Employment Opportunity Commission ("EEOC") filed suit against Abercrombie in the United States District Court for the Northern District of Oklahoma pursuant to Title VII, as amended, and alleged that Abercrombie had failed to accommodate Ms. Elauf's religious practice of wearing a headscarf. The EEOC pursued only a failure to accommodate claim; it did not advance a disparate treatment claim.

The district court granted summary judgment to the EEOC and denied Abercrombie's motion for summary judgment. Pet. App. 92a.

The court of appeals reversed the district court's ruling. Pet. App. 1a. It relied upon the undisputed fact that Ms. Elauf had never informed Abercrombie that she felt obligated to wear a headscarf for religious reasons and that Abercrombie had no actual knowledge of that fact from any other source. The court of appeals rejected the EEOC's argument that it was unnecessary for Ms. Elauf to inform Abercrombie that she felt religiously obligated to wear the headscarf. It held that:

> [O]rdinarily plaintiffs must establish that they initially informed the employer that they engage in a particular practice for religious reasons and that they need an accommodation for the practice due to a conflict between the practice and the employer's work rules.

Pet. App. 46a. The court of appeals stated that it found ample support for its decision in its own case law, case law from other circuits, the EEOC's own regulations, and analogous case law under the Americans with Disabilities Act. Pet. App. 29a. The court of appeals noted that, even in the few decisions which did not require the applicant to specifically "inform" the employer of the conflict, the employer must have "particularized, actual knowledge of the key facts that trigger its duty to accommodate" from some source, which indisputably did not happen in this case. Pet. App. 34a.

The court of appeals also explained that it had reached the only logical and practical resolution. Pet.

App. 46a. ("we are hard pressed to see how we could logically reach any other conclusion"). The court of appeals noted that because an applicant's religious beliefs are inherently personal and are generally not known to a prospective employer, and because Title VII and the EEOC's regulations preclude employers from inquiring into a prospective employee's religious beliefs, it is logically necessary to place the burden upon an applicant to raise the need for religious accommodation.

A dissenting opinion concurred with the court of appeals' ruling that it was error for the district court to grant summary judgment to the EEOC, but dissented from the court of appeals' decision to the extent that it entered summary judgment for Abercrombie, stating that the case should have been remanded for trial. Importantly, the Dissent acknowledged that the court of appeals' decision applied the Tenth Circuit's "prior rendition of the elements of a *prima facie* case." Pet. App. 76a. The Dissent also noted:

> I agree with the majority that, in the ordinary case, it is the job applicant who must inform the employer that she has a religious belief that conflicts with the requirements of the job for which she is applying. This makes sense, of course, because generally it will be the job applicant who will have superior knowledge of that conflict. It is the job applicant who knows of her religious beliefs and practices.

Pet. App. 79a. Nonetheless, the Dissent advocated that the elements of a *prima facie* case laid out by the Tenth Circuit in *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000) be abandoned and proposed a new iteration of the *prima facie* case, which had not been utilized in any circuit and drew no support from any precedent from this Court. Pet. App. 81a.

The active members of the court of appeals denied EEOC's request for a rehearing *en banc*. Pet. App. 121a.

REASONS FOR DENYING THE WRIT

A. Introduction

It is undisputed that Samantha Elauf did not inform Abercrombie that her religious beliefs required her to wear a headscarf when she was at work. It is axiomatic that an employer must have actual notice that an applicant's mandatory religious practice conflicts with an employment requirement, and thus of the need for accommodation, before the employer can be held liable under Title VII for failing to accommodate the religious practice. For more than 30 years, the federal circuit courts have unanimously held that an employer must have actual knowledge that a religious conflict exists, *i.e.*, that an employee or job applicant engages in a mandatory religious practice that conflicts with employment requirements,

before the employer is required to accommodate the practice.

Accordingly, the Tenth Circuit Court of Appeals granted summary judgment to Abercrombie, holding that notice of a religious conflict would "ordinarily" be provided by a job applicant, who generally is the only one who knows whether the conflicting practice is motivated by religious beliefs (rather than by cultural traditions or personal preference) and whether she views the practice as mandatory or discretionary. The court of appeals acknowledged that in some cases an employer may obtain actual knowledge of an applicant's need for potential religious accommodation from some other source, but it found that summary judgment was warranted in favor of Abercrombie in this case because it was undisputed that Abercrombie had no actual knowledge from any source. Pet. App. 40a.

Far from creating a circuit split, the court of appeals' holding was exhaustively supported by: (1) the Tenth's Circuit's own precedent requiring an employee to inform the employer of the need for an accommodation, (2) the rulings of other circuit courts of appeals reaching the same result, (3) the court's determination that it was most "logical" to require an employee or applicant to initiate the accommodation process by informing the employer of the conflict, (4) the "EEOC's own regulatory pronouncements" that require an applicant to inform an employer of the need for religious accommodation, and (5) well-established legal principles applied in the context of

requests for accommodation made under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213. Pet. App. 29a.

The EEOC now seeks a writ of certiorari based upon a purported "conflict" among the circuit courts as to whether "direct, explicit notice [of a religious conflict] from the applicant" is necessary to hold an employer liable for failing to accommodate a religious practice. Petition, 16. The EEOC argues that liability under Title VII does not require "direct, explicit notice from the applicant" but it ignores the court of appeals' finding that Abercrombie also had no notice from any other source. Pet. App. 40a ("the EEOC is clearly mistaken on this point").

All of the circuit courts that have addressed the issue have held that applicants and employees who wear an article of clothing that is sometimes (but not always) associated with a particular religion do not thereby notify the employer that the clothing is being worn for religious (rather than cultural or personal) reasons or that they personally believe for religious reasons that it is mandatory to wear the clothing at work, *i.e.*, that there is an actual conflict with an employment requirement that makes a religious accommodation necessary. Indeed, the EEOC's own regulations confirm that applicants are not permitted to remain silent and to assume that the employer recognizes the religious motivations behind their fashion decisions. There is no "circuit split" on this question, and a writ of certiorari is not warranted on that basis.

B. There Is No Split in Authority Warranting This Court's Intervention.

1. An Employer Cannot Be Liable for Failing to Accommodate a Religious Conflict Unless it Knows that the Religious Conflict Exists.

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits employers from discriminating against employees or job applicants on the basis of religion. 42 U.S.C. § 2000e-2(a) ("[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual because of such individual's religion."). The term "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observation or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). *See, e.g., Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 63 (1986). An employer thus has "a statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). *See also EEOC v. Union Independentient de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002).

No accommodation is required by Title VII unless an employee's practice is based on a *bona fide* religious belief rather than on cultural traditions or

personal preference. "The requirement that the employee have a 'bona fide religious belief' is an essential element of a religious accommodation claim" because "Title VII does not mandate an employer accommodate what amounts to a 'purely personal preference.'" *EEOC v. Union Independiente*, *supra*, 279 F.3d at 56, *quoting Vetter v. Farmland Industries, Inc.*, 120 F.3d 749, 751 (8th Cir. 1997).[2]

An employer's duty to accommodate a conflict between an employee's religious belief or practice and an employment requirement cannot arise until the employer actually knows that the conflict exists. "[S]imply announcing one's belief in a certain religion, or even wearing a symbol of that religion (*i.e.*, a cross or Star of David) does not notify the employer of the particular beliefs and observances that the employee holds in connection with her religious affiliation." *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 319-20 (3d Cir. 2008); *Chalmers v.*

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[2] "Title VII does not require the accommodation of personal preferences, even if wrapped in religious garb." *Hussein v. Hotel Employees and Restaurant Union*, 108 F. Supp. 2d 360, 370 (S.D. N.Y. 2000). *See Reed v. Great Lakes Cos.*, 330 F.3d 931, 935 (7th Cir. 2003) ("an employee is not permitted to redefine a purely personal preference or aversion as a religious belief"); *Davis v. Fort Bend County*, No. 4:12-CV-131, 2013 U.S. Dist. LEXIS 130197, *8 (S.D. Tex. Sept. 11, 2013) ("being an avid and active member of a church does not elevate every activity associated with that church into a legally protectable religious practice"; when an "[employee's] absence from work [to participate in a church event] was due to personal commitment, not religious conflict," the employer had no duty to accommodate her).

Tulou Co. of Tulsa, 101 F.3d 1012, 1020 (4th Cir. 1996), *certiorari denied*, 520 U.S. 813 (1997) (holding that an employer's knowledge that its employee was a devout Christian did not provide notice that the employee felt religiously obligated to send letters to co-workers at their homes accusing them of immorality; "[k]nowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious conduct, no matter how unusual"). In *Laney v. Ohio Dept. of Youth Services*, 448 Fed. Appx. 553, 556 (6th Cir. 2011), plaintiff was asked by her employer to remove a headscarf she wore to work, but she could not establish her claim of religious discrimination because she did not inform her employer that, as a Muslim, she was required for religious reasons to wear the headscarf at work.

In *Cary v. Carmichael*, 908 F.Supp. 1334 (E.D. Va. 1995), *affirmed sub nom. without opinion*, *Cary v. Anheuser-Busch, Inc.*, 116 F.3d 472 (4th Cir. 1997), the court explained that notice to the employer of the religious conflict is crucial for two reasons:

> First, only when sufficiently notified would any employer have a reasonable opportunity to take reasonable steps to accommodate an employee's conduct.
>
> Second, and probably more important, the notice requirement goes directly to the heart of the statute. [D]ischarge of an employee for failure to comply with valid employment requirements, where the employer does not

> have sufficient knowledge of an employee's religious beliefs or practice cannot be held to violate the statute.

908 F. Supp. 2d at 1343-44, 1346. In the instant case, Abercrombie had no notice of Ms. Elauf's religious conflict, from any source, and thus had no duty to accommodate the conflict.

2. The Court of Appeals Followed the Overwhelming Case Law Holding that an Employee or Applicant Must Ordinarily Inform the Employer that a Religious Conflict Exists.

Courts of appeals in every circuit court that have addressed the elements of a failure to accommodate claim under Title VII have repeatedly and unanimously held that an employer cannot ordinarily be held liable for failing to accommodate a religious practice of an employee until the employer is informed of the religious practice and the conflict with work requirements. *See, inter alia, Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 8 (1st Cir. 2012) ("the employee must show that he or she brought the [religious] practice to the [employer's] attention") (citation omitted); *Baker v. Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006) (plaintiffs "must show they held a bona fide religious belief conflicting with an employment requirement" and that "they informed their employers of this belief"); *Wilkerson, supra*, 522 F.3d at 319 ("[t]he employee must give the employer 'fair warning' that a

particular employment practice will interfere with that employee's religious beliefs"); *EEOC v. Thompson Contracting, Grading, Paving, and Utilities, Inc.*, 333 Fed. Appx. 768, 771 (4th Cir. 2009) (the employee must prove that he "had a bona fide religious belief that prevented him from working on Saturdays" and that he "informed [his employer] of his belief"); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 144 (5th Cir. 1982) (plaintiff must establish that "he had a bona fide religious belief that conflicted with an employment requirement [and] that he informed his employer of this belief"); *Nobach v. Woodland Village Nursing Ctr., Inc.*, No. 13-60378, 2014 U.S. App. LEXIS 15236, at *10 (5th Cir. Aug. 7, 2014) (failure to accommodate claim failed as a matter of law because plaintiff "failed to put on evidence that [employer] had knowledge of her religion"); *Burdette v. Federal Express Corp.*, 367 Fed. Appx. 628, 633 (6th Cir. 2010) (plaintiff "must show she informed her employer about the conflicts" between her "sincere religious belief [and] an employment requirement"); *Xodus v. Wackenhut Corp.*, 619 F.3d 683, 686 (7th Cir. 2010) ("[a]n employee has a duty to give fair notice of religious practices that might interfere with his employment"); *Jones v. TEK Industries, Inc.*, 319 F.3d 355, 359 (8th Cir. 2003) ("[plaintiffs] must show that they have a bona fide religious belief that conflicts with an employment requirement [and] that they informed [their employer] of this belief"); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (plaintiff must establish that "he informed his employer of

[his religious] belief and conflict [with an employment duty]"); *Thomas*, *supra*, 225 F.3d at 1155 (plaintiffs "must show [they] informed his or her employer of a [religious] belief" that "conflicts with an employment requirement"); *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007) ("[a] Title VII plaintiff must first establish that he had a bona fide religious belief that conflicted with an employment requirement [and] he informed his employer of his belief"); *Taub v. F.D.I.C.*, No. 96-5139, 1997 U.S. App. LEXIS 41401, *2 (D.C. Cir. 1997) (plaintiff must show that he "informed" his employer of a "bona fide religious belief that conflicts" with employment requirements).

Furthermore, as the court of appeals noted, this approach is consistent with the weight of authorities under the ADA that have held that an employer's obligation to accommodate does not arise until the employee has made an adequate request for an accommodation. Pet. App. 69a-72a.

In sum, there is no split in circuit authority warranting this Court's intervention. To the contrary, the court of appeals' decision was consistent with well-established precedent in every circuit.

3. The Court of Appeals Followed the EEOC's Own Regulations, Which Recognize that an Employee or Applicant Must Ordinarily Inform the Employer that a Religious Conflict Exists.

Historically, the EEOC recognized in its regulations and guidance that an employee or applicant must inform the employer of the existence of a conflict between an employee's compulsory religious practice and the employer's work requirements. Pet. App. 68a. An employer's "obligation to reasonably accommodate the individual's religious practices" arises "[a]fter an employee or prospective employee notifies the employer of his or her need for a religious accommodation." 29 C.F.R. § 1605.2(c)(1). According to EEOC's Compliance Manual:

> An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand.
>
> * * *
>
> No "magic words" are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement. However, the applicant or employee must provide enough

> information to make the employer aware that there exists a conflict.

Id. at § 12-IV(A)(1).

The religious basis and mandatory nature of an employee's practice depend upon the employee's personal religious beliefs, which are ordinarily invisible to employers unless disclosed by the employee. The EEOC recognized that "the same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons." EEOC Compliance Manual § 12-I(A)(1). For this reason and to avoid allegations of intentional discrimination, employers have been cautioned by the EEOC to "avoid assumptions or stereotypes about what constitutes a religious belief or practice." EEOC Best Practices for Eradicating Religious Discrimination in the Workplace, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited 8/19/2014); Pet. App. 54a. The EEOC has further discouraged employers from asking applicants about their religious beliefs. EEOC, Pre-Employment Inquiries and Religious Affiliation or Beliefs, available at http://www.eeoc.gov/laws/practices/inquiries_religious.cfm; Pet. App. 54a.

Significantly, the EEOC issued new official guidance on March 6, 2014, after the court of appeals ruled in favor of Abercrombie, changing its prior positions on these issues. Instead of requiring notice from the employee, as its prior guidance had done, the EEOC announced that "[i]n some instances, even

absent a request [by the employee], it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed." *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, § 7. The EEOC apparently now believes that interviewing managers should rely upon stereotypes to make assumptions about an applicant's religious beliefs or practices, based upon their personal appearance or dress. This new guidance – cited in the EEOC's Petition – is troublingly inconsistent for employers, but it is also inapplicable to this case, which arose years prior to its issuance. Here, the court of appeals' decision was squarely in line with the EEOC's then-current guidance, as well as decades of well-established Title VII legal authority.

4. The Cases Cited By the EEOC Do Not Demonstrate a Split in Authority that Warrants Intervention by this Court.

As detailed above, every circuit has required the plaintiff asserting a failure to accommodate claim to demonstrate that the employer had actual knowledge of a conflict between the employee's religious belief and an employment requirement. The court of appeals pointed out that even the cases cited by EEOC to support a "broader view of the notice requirement" nevertheless required "some significant measure of particularized, actual knowledge" on the part of the employer, and that Abercrombie had no such knowledge from any source "even were we to assume that

an employer may be put on notice from a source other than applicants or employees." Pet. App. 36a, 39a. Title VII liability cannot be predicated "on the ground that the employer should have guessed, surmised, or figured out from the surrounding circumstances that the [employee's] practice was based upon his or her religion and that the plaintiff needed an accommodation." Pet. App. 39a.

As the court of appeals found, in each of the four cases cited by Petitioner to demonstrate a split in authority, the employer had actual knowledge of the employee's religious beliefs and the conflict with the work requirement. In two of the cases, the employee expressly requested an accommodation (time off from work) from the employer to attend a religious ceremony involving a relative, and the issue was whether the employee's notice to the employer sufficiently indicated that it was a mandatory religious ceremony. In *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993), the employee's request for time off to attend his wife's "conversion ceremony" was deemed to be sufficient notice where the employer also knew that the employee was Jewish and that his wife was converting to Judaism. In *Adeyeye v. Heartland Sweeteners*, 721 F.3d 444 (7th Cir. 2013), the employee informed his employer that he needed to travel to Nigeria to lead his father's traditional burial rites, and that this was "compulsory," *i.e.*, that his family members would suffer spiritual death if he did not attend. *Adeyeye*, 721 F.3d at 450. The court reversed summary judgment in favor of the employer, holding

that the employee's "multiple references to spiritual activities and the potential consequences in the afterlife provided sufficient notice to Heartland that Adeyeye was making a religious request." *Adeyeye*, 721 F.3d at 451. Significantly, its ruling on the knowledge issue would preclude Elauf's claims in the present case:

> The employee must make the request reasonably clear so as to alert the employer to the fact that the request is motivated by a religious belief.

Adeyeye, 721 F.3d at 450.

In *Dixon v. Hallmark Companies, Inc.*, 627 F.3d 849 (11th Cir. 2010), the employer "knew that the [employees] were dedicated Christians who had previously opposed policies prohibiting the public display of religious items in the workplace." *Dixon*, 627 F.3d at 853, 855. They had repeatedly replaced their Christian posters and religious items each time they were removed by the employer, and they "made it clear" on the final occasion that a religious poster "was not going to come down." *Dixon*, 627 F.3d at 853. The employer argued that the employees "never expressly told" it that they refused to remove the religious items "because they opposed efforts to remove God from public places," but the Court held that the employer had "enough information" from the employees "to understand the existence of a [religious] conflict." *Dixon*, 627 F.3d at 856. Abercrombie had no such information in the present case.

Finally, in *Brown v. Polk County, Iowa*, 61 F.3d 650 (8th Cir. 1995), the employee was disciplined for, *inter alia*, conducting prayer meetings at work. Although the employee never explicitly asked for accommodation the court found that the employer had "enough information to understand the existence of a conflict" because it had previously reprimanded him in writing for prior similar religious activities. *Id.* at 654.

The court of appeals thoroughly analyzed these cases and concluded that these courts "clearly have predicated their notice holdings on the employer's particularized, actual knowledge." Pet. App. 36a. Distinguishing these cases from the present case, the court of appeals found that Abercrombie had ***no knowledge*** from ***any source***:

> [E]ven were we to assume that [previous case law] would permit a plaintiff to establish a prima facie case without demonstrating that the applicant or employee was the source of the employer's notice of the need for a religious accommodation, the EEOC could not prevail here [T]here is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had such *actual* knowledge – *from any source* – that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it.

Pet. App. 34a.

In this proceeding, the EEOC cannot challenge the factual finding that Abercrombie had no knowledge from any source that Ms. Elauf wore the headscarf for religious reasons, rather than for cultural or personal reasons, or that she felt religiously obligated to wear the headscarf at work. No circuit courts have supported the EEOC's contention that merely wearing a headscarf is sufficient notice of the existence of a religious conflict and the need for religious accommodation under Title VII. Courts that have addressed similar issues have held that clothing does not provide sufficient notice of a religious conflict under Title VII because it does not inform the employer that the clothing is being worn for religious reasons, rather than cultural or personal reasons, or that it must to be worn at all times. *See, e.g., Wilkerson, supra*, 522 F.3d at 319 ("wearing a symbol of [the employee's] religion (i.e., a cross or Star of David) does not notify the employer of the particular beliefs and observances that the employee holds in connection with her religious affiliation"); *Laney, supra*, 448 Fed. Appx. at 556 (asking an employee to remove a headscarf was not religious discrimination under Title VII where the employee did not inform her employer that "she needed to wear the scarf" for religious reasons); *Baaqee v. Brock & Bleving Construction Co.*, No. 99-588-AH-C, 2000 U.S. Dist. LEXIS 9862, at *17 (S.D. Ala. 2000) (fact that Muslim employee did not drink or smoke, and wore a "Crescent Star ring which symbolizes his religion" was insufficient to show that his employer had notice); *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d 190, 199

(D. Mass. 2004), *affirmed*, 390 F.3d 126 (1st Cir. 2004) (fact that employee wore body piercings did not inform employer that she did so based on a "religious belief" rather than a "personal preference").

Accordingly, there is no split in authority as to whether an employer must have particularized, actual knowledge that a religious conflict exists before a duty to accommodate arises, and there is no reason to grant certiorari in this case.

C. There Are No Exceptional Circumstances Warranting This Court's Intervention.

The EEOC argues in its Petition that this case presents a question of exceptional importance, citing the number of charges of religious discrimination filed with it last year and speculating (without corroboration) that the circumstances present in this case may frequently repeat themselves. Petition, 23-25. Ironically, the EEOC made the opposite argument below, assuring the court of appeals that employers need not worry about a "torrent of litigation regarding the assumptions of the employer" due to the "paucity of appellate decisions addressing the type of notice circumstances present in this case." In explaining away its own regulations, the EEOC claimed that it had not even contemplated the unique factual situation present in this case. In any event, there is no support for the EEOC's current legal position regardless of the number of charges of religious discrimination that are filed.

In reality, this case involves unique factual circumstances relating to a single individual's application for part-time employment. As explained above, the court of appeals' comprehensive decision did not establish a "new" rule of law, but rather is in accord with long-established precedent and the EEOC's own regulations. Simply put, this case does not present a question of exceptional importance worthy of this Court's review.

CONCLUSION

For all of the foregoing reasons, the EEOC's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARK A. KNUEVE
Counsel of Record
DANIEL J. CLARK
VORYS, SATER, SEYMOUR
AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-6387
Fax: (614) 719-4808
maknueve@vorys.com

No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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REPLY BRIEF FOR THE PETITIONER

By holding that an employer may discriminate against a job applicant or employee based on practices that the employer correctly believes to be religious, so long as the employer does not have "actual knowledge" of the need for a religious accommodation based on the explicit statements of the applicant or employee, the Tenth Circuit diverged from other courts of appeals, deviated from the text and structure of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, and opened a safe harbor for religious discrimination. This Court's intervention is needed, and respondent's arguments against review lack merit.

1. As set out in the petition, the Tenth Circuit created a conflict with four other circuits in its interpretation of the notice requirement under Title VII. The

conflict is straightforward: the court of appeals held that an employer need only accommodate an applicant or employee's religious practices if the applicant or employee directly and explicitly "informed the employer that the [applicant or employee] adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule," Pet. App. 28a, giving rise to "particularized, *actual* knowledge of the key facts that trigger [the employer's] duty to accommodate," *id.* at 34a. The court below defined "particularized, actual knowledge" in contradistinction to an employer's "correct guess or assumption" that a religious conflict existed based on the employer's inferences from religious garb or other sources. *Id.* at 42a n.9.

Three other courts of appeals have held, in contrast, that Title VII obligations are triggered if an employer has "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Brown* v. *Polk Cnty.*, 61 F.3d 650 (8th Cir. 1995) (en banc) (citation omitted), cert. denied, 516 U.S. 1158 (1996); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010). A fourth court of appeals has adopted a similar standard without citing the rule adopted by other courts. *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013) (explaining that "Title VII has not been interpreted to require adherence to a rigid script to satisfy the notice requirement" and that the "employer * * * must be alert enough to grasp that the request

is religious in nature" when an employee makes a request "reasonably clear so as to alert the employer to the fact that the request is motivated by a religious belief"). These courts of appeals do not demand that notice come from explicit verbal statements of the employee giving rise to "actual, particularized knowledge" on the part of the employer.

Respondent contends (Br. in Opp. 19-24) there is no conflict of authority because the Seventh, Eighth, Ninth, and Eleventh Circuits set out their rules in cases in which employers in fact "had actual knowledge of the employee's religious beliefs and the conflict with the work requirement," *id.* at 20, whereas respondent's hiring officials correctly believed there was a conflict but lacked "actual knowledge." The distinction is irrelevant because—whether or not actual knowledge was present in other court of appeals' cases—actual knowledge was not required by the rules that those courts adopted. As noted above, three courts of appeals held that an employer needs to have "*only enough information* * * * to *permit* the employer to understand the existence of a conflict," without regard to the employer's actual understanding. *Brown*, 61 F.3d at 654; *Heller*, 8 F.3d at 1439; *Dixon*, 627 F.3d at 856 (emphasis added). A fourth has likewise held that an employer can be liable under Title VII regardless of whether the employer actually concludes that a conflict exists. *Adeyeye*, 721 F.3d at 450 (7th Cir.) (explaining that "[t]he employer * * * must be alert enough to grasp that the request is religious in nature" and that "an employer cannot shield itself from liability by intentionally remaining in the dark") (internal quotation marks omitted).

In any event, respondent's assertion that these cases involved employers with "actual knowledge of the employee's religious beliefs and the conflict with the work requirement" is incorrect. Br. in Op. 20. *Adeyeye* held that a jury could find letters requesting time off "provided sufficient notice" to an employer to trigger a duty of accommodation without regard to whether the employer understood the employee's request, and made no finding that the employer had actually understood the religious nature of the request. 721 F.3d at 450-451. *Heller* likewise found an employee established a prima facie case under Title VII because an employer received enough information "to permit the employer to understand the existence of a [religious] conflict," 8 F.3d at 1439, without any suggestion that the employer had actual knowledge of the conflict.

Dixon and *Brown* similarly found notice sufficient when employers' words and actions demonstrated that they *believed* there was a conflict between work rules and religious practice—precisely the type of evidence that the Tenth Circuit distinguished from "actual knowledge" and found insufficient as a matter of law in this case. Compare *Dixon*, 627 F.3d at 855-856 (adequate notice despite absence of explicit accommodation request because employer's statements established that employer believed there was a religious conflict); *Brown*, 61 F.3d at 654 (same), with Pet. App. 42a n.9 (finding "actual knowledge" standard not satisfied where hiring official correctly inferred that applicant wore headscarf for religious reasons because the fact that "an employer was able to make a correct guess or assumption would not mean that the employer possessed * * * actual knowledge"). Respondent

describes the facts of these cases at length (Br. in Opp. 20-22) but fails to identify a passage in any of these decisions in which the relevant court found the employer possessed the "actual knowledge" that respondent suggests was these decisions' touchstone.

Respondent also suggests that this case is not an appropriate vehicle for resolving the question of whether actual knowledge is required because respondent "did *not* have actual knowledge of a religious conflict from *any* source." Br. in Opp. 1. But the question presented is whether an employer who assumes correctly that a religious conflict exists and acts on that basis may nonetheless avoid liability because it lacked "actual knowledge" obtained through direct notice given by the applicant. See Pet. i. The absence of "actual knowledge" on the part of respondent is thus a premise of the question presented—not a basis on which to deny review.

Respondent alternatively contends (Br. in Opp. 1-2) that the question presented is best framed as a fact-specific dispute over "[w]hether an applicant adequately informs a prospective employer of the need for a religious accommodation under Title VII simply by wearing an item of clothing which can be but is not always associated with a particular religion." *Id.* at i. But this case does not involve the application of a settled legal standard to particular facts, because, as set forth above, the court of appeals in this case adopted a standard for notice that conflicts with the standards utilized in at least four other courts of appeals. See pp. 1-4, *supra*. And respondent is mistaken to suggest that this case would be resolved the same way under any circuit's standard, because in every circuit "more is required of an applicant" than

simply "wearing an item of clothing which can be but is not always associated with a particular religion." Br. in Opp. 1. Respondent's description of the facts omits that respondent's hiring representatives *did* correctly understand Samantha Elauf's wearing of a headscarf to reflect a religious practice, and that respondent nonetheless elected not to hire Elauf based on her headscarf. These omitted facts are important because, as noted above, courts of appeals applying the more flexible notice standard rejected by the Tenth Circuit have found Title VII's notice requirement satisfied by evidence that company representatives correctly inferred the existence of a religious conflict. See pp. 4-5, *supra*.

Finally, respondent is wrong to suggest that review of the conflicting notice standards applied by the courts of appeals is unwarranted because certain additional courts of appeals have articulated notice standards that may be consistent with the holding of the court of appeals below. Br. in Opp. 14-16. In particular, in *Wilkerson* v. *New Media Technology Charter School Inc.*, 522 F.3d 315 (2008), the Third Circuit held that a school had no duty to accommodate an employee who objected to participating in a "libation ceremony" because the employee "did not inform the defendants that the libation ceremony would offend her religious beliefs." *Id.* at 320. Absent that direct, explicit notice, the court found that even if the employer "suspected that the libations ceremony would offend" the plaintiff, the school was free to fire the plaintiff for refusal to participate. *Id.* at 319-320. But reading *Wilkerson* as consistent with the Tenth Circuit's decision here does not eliminate the conflict

in the circuits; instead, it deepens the conflict, providing additional grounds for this Court's intervention.*

2. Respondent's brief contains nothing to rehabilitate the court of appeals' holding that an employer may refuse to hire an applicant based on what the

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* It is uncertain whether the remaining cases cited by respondent (Br. in Opp. 14-16) reflect agreement with the holding of the court of appeals here. The formulations on which respondent relies are principally one-sentence glosses in cases in which there was no dispute that the notice requirement was satisfied. See *Sánchez-Rodríguez* v. *AT&T Mobility P.R., Inc.*, 673 F.3d 1, 8 (1st Cir. 2012); *Burdette* v. *Federal Express Corp.*, 367 Fed. Appx. 628, 633 (6th Cir. 2010); *EEOC* v. *Thompson Contracting*, 333 Fed. Appx. 768, 771 (4th Cir. 2009); *Morrissette-Brown* v. *Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1321, 1323-1324 (11th Cir. 2007); *Baker* v. *Home Depot*, 445 F.3d 541, 546-548 (2d Cir. 2006); *Peterson* v. *Hewlett-Packard Co.*, 358 F.3d 599, 606-608 (9th Cir. 2004); *Jones* v. *TEK Indus., Inc.*, 319 F.3d 355, 359 (8th Cir. 2003); *Brener* v. *Diagnostic Ctr. Hosp.*, 671 F.2d 141, 144-145 (5th Cir. 1982). The other citations are of a parenthetical in a page-long opinion finding a plaintiff failed to establish any elements of a prima facie case, *Taub* v. *FDIC*, No. 96-5139, 1997 WL 195521, at *1 (D.C. Cir. Mar. 31, 1997) (per curiam); a decision in favor of an employer who "was not aware of [applicant's] religion" based on information from any source, *Xodus* v. *Wackenhut Corp.*, 619 F.3d 683, 686-687 (7th Cir. 2010); and a case addressing intentional discrimination, not religious accommodation, *Nobach* v. *Woodland Vill. Nursing Ctr., Inc.*, No. 13-60397, 2014 WL 3882464 (5th Cir. Aug. 7, 2014). Further, some of the courts of appeals offering the brief formulations cited by respondent have already adopted the more flexible notice standard requiring only information sufficient to apprise the employer of a conflict from any source. Compare *Morrissette-Brown*, 506 F.3d at 1321; *Peterson*, 358 F.3d at 606, with *Dixon*, 627 F.3d at 856 (adopting more flexible standard); *Heller*, 8 F.3d at 1439 (same). In any event, regardless of whether the brief statements on which respondent relies signal agreement with the holding in this case, respondent fails to refute the existence of a circuit conflict on the question presented.

employer correctly believes to be a religious practice, so long as the employer does not have actual knowledge of the religious basis for the applicant's practice based on direct statements of the applicant. This holding is unsupported by the statutory text: an employer who declines to hire an applicant based on what the employer correctly believes to be a religious practice "fail[s] or refuse[s] to hire" an applicant because of "religious observance and practice," 42 U.S.C. 2000e(j), 2000e-2(a)(1), even if the employer has not received direct, explicit notice of the need for an accommodation from the applicant. See Pet. 13-14. And because the court's holding gives employers a strong incentive to avoid hiring applicants believed to require religious accommodation—rather than initiating dialogue—the holding is inconsistent with Title VII's objective of promoting "bilateral cooperation" aimed at reconciling "the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted).

The reasons that respondent marshals in support of the Tenth Circuit's position (Br. in Opp. 12-14) are reasons equally served by the more flexible notice standard of other courts of appeals. To be sure, as respondent suggests, an employer must have some notice of a religious conflict, because "only when sufficiently notified would any employer have a[n] * * * opportunity to take reasonable steps to accommodate an employee's conduct." Br. in Opp. 13 (citation omitted). But that standard is met whenever the employer receives "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's

religious practices and the employer's job requirements." *Brown*, 61 F.3d at 654. And the concern of fair warning is not implicated when (as here) an employer correctly infers that a conflict exists, and declines to hire an applicant because of the conflict.

Nor is respondent's position supported by the guidelines of the United States Equal Employment Opportunity Commission (EEOC) on which respondent relies (Br. in Opp. 17-19)—which do not by their terms limit permissible notice under Title VII. In the subsection of its guidelines entitled "[d]uty to accommodate," EEOC makes clear that employers must reasonably accommodate religious practices, absent a showing of undue hardship. See 29 C.F.R. 1605.2(b). That subsection does not limit the employers' duty to cases in which they receive notice of a conflict from a particular source. See *ibid.* Indeed, the related EEOC compliance manual—on which respondent itself relies (Br. in Opp. 17-18)—states that an employer's duty arises in any case in which the employer has notice of a conflict. It states in particular that "Title VII requires an employer, *once on notice*, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship." EEOC, *Compliance Manual, Section 12: Religious Discrimination* § 12-IV Overview (2008) (*Compliance Manual*) (emphasis added).

The portion of the EEOC guidelines on which respondent relies (Br. in Opp. 17-19) does not limit the circumstances under which employers' duties arise. The subsection entitled "[r]easonable accommodation" is devoted to explaining the work-rule modifications

that are required (and the modifications that are not required) when an employer has a duty under Title VII, rather than to explaining when an employer has a duty of accommodation at all. 29 C.F.R. 1605.2(c); cf. 29 C.F.R. 1605.2(b) (setting out when employer has "[d]uty to accommodate"). The subsection emphasizes that "[a]fter an employee or prospective employee notifies the employer * * * of his or her need for a religious accommodation"—likely the most common form of notice—the employer "has an obligation to *reasonably* accommodate the individual's religious practices," 29 C.F.R. 1605.2(c)(1) (emphasis added), before describing the scope of "reasonable" accommodations, 29 C.F.R. 1605.2(c)(1) and (2). But the reasonable-accommodation subsection does not purport to limit employers' duties, or to specify forms of notice that are acceptable under Title VII.

Similarly unavailing is the sentence from EEOC's compliance manual on which respondent relies. As noted above, the manual states that an employer has obligations to accommodate religious practices so long as the employer is "on notice" of the need for an accommodation. *Compliance Manual* § 12-IV Overview. EEOC's further direction that an applicant or employee "who seeks religious accommodation" is required to "make the employer aware" of the need for accommodation reinforces that an employer who has not been "ma[d]e * * * aware" of a conflict cannot be held responsible for failing to accommodate it. *Id.* § 12-IV(A)(1); see *ibid.* ("[T]he applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job"). The manual

does not state, however, that notice to an employer must come from explicit verbal statements directly from an applicant or employee. And such a requirement would be in tension both with the portion of the manual stating that employer's obligations are triggered when an employer is "on notice" of a conflict, *id.* § 12-IV Overview, and with the provisions explaining that "[n]o 'magic words' are required to place an employer on notice." *Id.* § 12-IV(A)(1).

3. As set out in the petition (Pet. 23-25), the question presented is one with practical significance. The thousands of religious discrimination charges filed annually with EEOC indicate that the standards of liability for religious discrimination are a matter of importance in real-world disputes. See Pet. 24. And the published decisions signal that many religious-accommodation cases involve employers who received notice of religious conflicts that fall short of the standard that the court of appeals would impose here. See *ibid.* (discussing cases). Further, the notice standard is critically important in the frequently-arising context of religious garb and grooming, where—as here—employers often have superior knowledge of company policies and may perceive and act on an apparent religious practice before an applicant is even aware of any conflict. See *id.* at 24-25 & n.2; Religious Orgs. Amicus Br. 7-8. This Court's intervention is needed to resolve the conflict among the courts of appeal on this important question.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

SEPTEMBER 2014

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONER

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
General Conference of Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

[Additional counsel on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

CARL H. ESBECK
LEGAL COUNSEL
National Association of Evangelicals
Room 209 Hulston Hall
University of Missouri
Law School
Columbia, MO 65211-4190
(573) 882-6543

KIMBERLEE WOOD COLBY
DIRECTOR, CENTER FOR LAW & RELIGIOUS FREEDOM
Christian Legal Society
8001 Braddock Rd., St. 302
Springfield, VA 22151
(703) 642-1070

RICHARD T. FOLTIN
DIRECTOR, NATIONAL & LEGISLATIVE AFFAIRS
American Jewish Committee
1156 15th St. NW, Suite 1201
Washington, DC 20005
(202) 785-5463

ZAINAB AL-SUWAIJ
EXECUTIVE DIRECTOR
American Islamic Congress
1718 M Street NW, #243
Washington, DC 20036
(202) 595-3160

BARBARA WEINSTEIN
DIRECTOR, COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM
Union of Reform Judaism
2027 Massachusetts Ave. NW
Washington, DC 20036
(202) 387-2800

GURJOT KAUR
COUNSEL
The Sikh Coalition
50 Broad Street, St. 1537
New York, NY 10004
(212) 655-3095

AISHA RAHMAN
EXECUTIVE DIRECTOR
KARAMAH: Muslim Women Lawyers for Human Rights
1420 16th St. NW, Suite 300
Washington, DC 20036
(202) 234-7302

QUESTION PRESENTED

Whether an employer can be liable under the religious-accommodation provision of Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if (a) the employer has actual knowledge of a religion-work conflict based on direct, explicit notice from the applicant or employee and (b) the religious observance or practice is "inflexible."

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

When Congress added a religious-accommodation requirement to Title VII in 1972, it recognized that religious freedom in the workplace is at least as important to most believers as freedom from government-imposed restrictions on religion. After all, many of the faithful will never feel the weight of the government impacting their religious lives, but nearly everyone needs a job.

Accordingly, Congress required that, where an employer can do so "without undue hardship on the conduct of [its] business," the employer must "reasonably accommodate ... all aspects" of an "employee's or prospective employee's religious observance or practice." 42 U.S.C. § 2000e(j). The statute thus makes it "unlawful" for an employer "to discharge any individual" or "to discriminate against any individual with respect to," among other things, the "privileges of employment, because of such individual's ... religion." 42 U.S.C. § 2000e-2(a)(1). As a result, Title VII prohibits employers from discriminating on the basis of religion—including an employee's need for a reasonable accommodation of a "religious observance or practice"—not just in their treatment of existing employees, but in hiring new employees.

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[1] No one (including a party or its counsel) other than the *amici curiae*, their members and counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. All counsel of record received timely notice pursuant to Rule 37.2 of *amici's* intent to file this brief, and all parties have consented to its filing in communications on file with the Clerk.

Unfortunately, the decision of the Tenth Circuit majority in this case would eviscerate these critical protections for religious freedom. First, as the EEOC's petition explains and the majority concedes, the panel's holding conflicts with other circuits by inventing a new requirement that, even if the employer has actual knowledge or notice of the need for a religious accommodation, that knowledge or notice doesn't "count" unless the employer has direct, explicit notice from the employee or applicant. That is so, moreover, even where an applicant doesn't yet know enough about the job to know an accommodation is needed—thereby creating a catch-22 for the religiously observant job seeker. Second, the majority erected a new, non-statutory requirement that the "religious observance or practice" at issue must be "inflexible" or mandatory, not just highly recommended or encouraged by the employee's religious beliefs.

Amici curiae are religious organizations—representing Christians, Jews, Muslims and Sikhs—that are deeply concerned about the impact of these two holdings on the ability of religiously observant job applicants to obtain and keep employment. From personal experience working with their members, *amici* know that the disparity between employer and employee is nowhere greater than during the hiring process. Frequently, an applicant will be unaware of a work-religion conflict simply because of her inferior knowledge of the employer's work requirements. And even if the applicant is aware of a potential conflict, hiring processes are often technologically structured in a way that precludes the employee from even raising the issue during the application process. The Tenth Circuit's approach creates an even greater incentive for employers to act as "ostriches"—remaining

willfully blind to the religious needs of employees and applicants alike.

Similarly, by allowing an employer to deny an accommodation based upon the perceived "flexibility" of a religious conviction, the Tenth Circuit's approach turns Title VII on its head. It provides religious convictions with even less protection than other, non-protected choices rather than providing the additional protections that Congress enacted to ensure respect for "*all* aspects" of an employee or applicant's "religious observance or practice, as well as belief." 42 U.S.C. § 2000e(j) (emphasis added).

For these reasons as well as those articulated by the EEOC, *amici* respectfully suggest that the Court should grant the EEOC's petition, and reverse the Tenth Circuit's decision.

STATEMENT

The case involves a young Muslim woman, Samantha Elauf, who was denied a job at an Abercrombie & Fitch store. The denial was based on an interview with a store official who, seeing she wore a headscarf, thought Ms. Elauf would likely require an accommodation of the store's "Look Policy," which prohibits headgear.

Over a vigorous dissent by Judge Ebel, the Tenth Circuit majority held that a job applicant who is rejected based on the employer's perception of a work-religion conflict cannot make a *prima facie* case under Title VII if, during the hiring process, a specific religious practice and resulting work-religion conflict were not expressly flagged by the potential employee herself—even if the employer was on notice of the potential conflict. See *E.E.O.C. v. Abercrombie & Fitch Stores*, Inc., 731 F.3d 1106, 1122-23 (10th Cir. 2013);

Pet. App. 28a-30a. Equally important, in reaching that conclusion, the Tenth Circuit held that an employer is required to accommodate a religious practice only if the potential employee views it as "inflexible"—that is, mandated rather than merely encouraged by the employee's religious beliefs. Id. at 23a-24a, 39a, 41a, 52a, 54a. Absent review and reversal by this Court, both holdings will govern the proceedings on remand in the district court in this case, and in future cases in the Tenth Circuit.

REASONS FOR GRANTING THE PETITION

The petition and Judge Ebel's dissent ably explain why the majority's holding on the "actual notice" point contravenes this Court's approach to addressing religious-discrimination claims such as those asserted by the EEOC and Ms. Elauf, and why the majority's approach conflicts with precedents from other circuits. But in addition to that circuit conflict, certiorari should be granted for two reasons: First, the question presented is of enormous practical importance to a wide array of believers from numerous religious traditions, and its importance increases daily as the nation grows more religiously diverse. Second, the Tenth Circuit's holdings—including its holding on the "inflexibility" point—are both legally erroneous and perverse.

I. The question presented is of immense practical importance.

Recent trends confirm the need to protect religious rights in the workplace. For example, charges of religion-based discrimination filed with the EEOC have

more than doubled over the last fifteen years,[2] even as the diversity of religious beliefs and practices has increased.[3] Moreover, while work-religion conflicts are common, they can almost always be accommodated without undue hardship as long as both employees and employers have an adequate incentive to undertake the necessary dialogue. That is true of conflicts arising from scheduling demands and those arising, as in this case, from appearance standards.

A. Sabbath and holy day observances frequently conflict with an employer's work schedule.

Conflicts between religious convictions and job duties frequently involve Sabbaths and holy days. See, *e.g.*, *Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Balint* v. *Carson City*, 180 F.3d 1047 (9th Cir. 1999); *Brown* v. *General Motors Corp*, 601 F.2d 956 (8th Cir. 1979). For example, Seventh-day Adventists, observant Jews and Seventh Day Baptists all observe Sabbath from sundown on Friday to sundown on Saturday. Other Christian groups hold

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[2] EEOC, Charge Statistics, FY1997 through FY2013, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last viewed Aug. 15, 2014).

[3] See Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey (2008) (available at http://religions. pewforum.org/pdf/report-religious-landscape-study-full.pdf) (last viewed Aug. 15, 2014) (finding that "the United States is on the verge of becoming a minority Protestant country ... Immigrants are also disproportionately represented among several world religions in the U.S., including Islam, Hinduism and Buddhism"); Gallup, Religion (2013) (available at http://www.gallup.com/poll/1690/religion.aspx) (last viewed Aug. 15, 2014) (finding just 41% of respondents to be Protestant).

similar beliefs on Sunday observance. Many Jews, Muslims, Christians and members of other faiths also observe holy days that sometimes occur during the business week.

While religious limitations on an employee's work schedule may not be as visible as the headscarf in this case, recent trends in employment applications indicate that this is a serious, although largely hidden, problem. Online recruiting and employment applications have exploded over the past decade.[4] And automated screening of online applications has become ever more prevalent.[5] But automated application processes create a serious problem for applicants whose religious practices create scheduling limitations by making it more difficult for such applicants to bring to an employer's attention the religious reasons for their scheduling limitations.

Unfortunately, the Tenth Circuit's reasoning gives the employer a perverse incentive to *deny* to religiously observant applicants any opportunity to discuss religion-based limitations on their appearance or scheduling. Under that reasoning, the employer's ignorance automatically defeats a prima facie case, and thus effectively eliminates Title VII's accommodation protections for those applicants. Under the Tenth

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[4] See Online Job Recruitment: Trends, Benefits, Outcomes and Implications, available at www.hr.com/en/communities/staffing_and_recruitment/online-job-recruitment-trends-benefits-outcomes-an_f70ogs0y.html (Sept. 25, 2007) (last viewed Aug. 15, 2014).

[5] See Recruiting Technology and Recruiting Software Trends 2013, available at www.recruiter.com/recruiting-technology-and-recruitingsoftware-trends.pdf (last viewed Aug. 15, 2014).

Circuit's position, then, observers of the Sabbath and other holy days will find themselves effectively excluded from a large and growing sector of the workforce that is hired through online applications.

Amici have received numerous troubling reports of online application systems that have precisely this effect. In those systems, once an applicant has completely filled out one of a series of pages, that page is submitted and the next page appears. During this process, a page generally inquires about the applicant's scheduling availability. If the applicant indicates any limitation, the response is not accepted and the applicant is unable to proceed further with the application—and therefore cannot be hired. Thus, a Sabbath-observer who does not indicate availability for work during her Sabbath is unable even to complete the application and is thus excluded from employment, even if a scheduling accommodation could be accomplished with little to no effort or cost to the employer.

The Tenth Circuit's decision effectively insulates such systems from any legal challenge under Title VII. And that means that many religiously observant job seekers will never even get to the interview stage of the hiring process.

B. Religiously motivated appearance frequently conflicts with an employer's "look" rules.

Another issue that often arises in the workplace concerns religious dress and appearance. Many Muslim women, like Ms. Elauf, believe that the Quran requires or at least encourages them to cover their heads in public. See, *e.g.*, *Kaukab* v. *Harris*, 2003 WL 21823752 (N.D. Ill. Aug. 6, 2003). Sikhs are likewise required to wear turbans and maintain uncut hair,

including beards. See, *e.g.*, *Bhatia* v. *Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984). And many Jews wear head coverings such as hats or yarmulkes. See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

Appearance-related religious practices are also often found in various Christian denominations. Many Pentecostal women do not cut their hair and wear head coverings. And Christians of all denominations wear various forms of religious jewelry such as crosses or crucifixes, religious medals and evangelistic messages. See, *e.g.*, *Rivera* v. *Choice Courier Systems, Inc.*, 2004 WL 1444852 (S.D.N.Y. Jun. 25, 2004); *Hickey* v. *S.U.N.Y. at Stony Brook Hospital*, 2012 WL 3064170 (E.D.N.Y. Jul. 27, 2012).

Some of these religious practices are, by their nature, apparent during an interview. Frequently, accommodation is possible simply by modifying apparel in a manner that eliminates the conflict. However, such accommodation cannot be achieved unless the need for an accommodation is first identified and discussed. And here again, the Tenth Circuit's decision discourages such discussion because, under that decision, an employer can face liability based only on what the employee or applicant *herself* directly communicates to the employer, not on knowledge the employer might have received from other sources, including the employer's own observations.

In short, the majority's analysis is likely to have profound and far-reaching impacts on a wide variety of religiously observant employees and applicants. And it will too often force them to choose, unnecessarily, between a job and their faith.

II. The Tenth Circuit's holdings are as perverse as they are erroneous.

In ruling against Ms. Elauf, the Tenth Circuit relied upon two closely related legal holdings that are not only erroneous, they are perverse. One is the requirement that the employer have actual knowledge of the conflict, based upon information obtained directly from the employee. The other is the requirement that the religious practice at issue be mandatory. Both of these holdings are fairly included within the question presented in the petition, although *amici* respectfully suggest that the question be refined to include both points expressly.

A. The Tenth Circuit's "actual knowledge" requirement not only conflicts with rulings in other circuits, it also lacks any mooring in Title VII or this Court's decisions.

By itself, the Tenth Circuit's "actual knowledge" requirement would effectively gut Title VII's accommodation requirement.

1. One central problem with the Tenth Circuit's interpretation of Title VII is its holding that the only acceptable source of information concerning a work-religion conflict is the employee or applicant, regardless of all other information of which the employer is aware. See Pet. App. 29a-31a, 33a, 71a. Under that view, for example, Title VII is simply inapplicable unless Ms. Elauf *personally* utters certain (unspecified) statements establishing a work-religion conflict. Thus, even if Ms. Elauf had been accompanied to the job interview by her imam, who explained the Quranic requirement of the headscarf, the employer would still have no obligation under Title VII simply because that informat ion did not come directly from

Ms. Elauf. That is absurd, and it has no support in the language, history or interpretation of Title VII.[6]

Equally problematic is the Tenth Circuit's highly elevated threshold requiring "particularized, *actual* knowledge" of a specific work-religion conflict. Pet. App. 34a, 36a, 39a-41a, 43a. This elevated standard is likewise not found in the language or history of Title VII. And it runs counter to the purpose and goals of Title VII, which is designed "to assure equality of employment opportunities" regardless of religion. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 276 (1982). This is especially true in the employment application context, in which an employer's knowledge of its own business and resulting job requirements is vastly superior to that of the applicant. How is an applicant supposed to identify every "particularized" work-religion conflict that might arise during an employment relationship that has not even yet begun?

2. As a result of these misinterpretations of Title VII, the Tenth Circuit's holding effectively permits an employer to ignore a work-religion conflict of which it is aware from a source other than the employee or applicant. That is perverse for at least three reasons.

First, it frustrates one of the key purposes of the accommodation requirement, which is to spur a dialogue between employer and employee on how best to

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[6] While formulations of the *prima facie* case frequently refer to notice by the employee, this is merely because that is the most common fact pattern. In the typical case, the work-religion conflict will be exposed as a matter of course by an employee who objects to a conflicting work requirement once she learns of it. The same cannot be said of potential conflicts with work rules that are known only to an employer during the hiring process.

meet the employer's objectives while satisfying the employee's religious desires. As this Court has put it, "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and ... the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986). Or, as the Eighth Circuit has suggested, the purpose of Title VII's accommodation process is to allow the "employer [to] have ... the chance to explain the [relevant] policy in relation to [the employee's] religious needs, and perhaps work out an arrangement satisfactory to both parties." *Johnson* v. *Angelica Uniform Group*, 762 F.2d 671, 673 (8th Cir. 1985).

Yet under the standard adopted by the Tenth Circuit, employers have a powerful incentive to *avoid* any meaningful interaction with applicants and ignore recognized conflicts rather than communicate about possible solutions. Employers may sit back, secure in the knowledge that if an employee seeks to enforce compliance with Title VII's accommodation requirement, the employer can stick its head in the sand and claim ignorance, since despite the employer's actual awareness of the conflict, the employee used no "magic words" to describe the need for accommodation. Such an approach defies both the purpose of Title VII and common sense. As the Ninth Circuit recognized when addressing this same issue in *Heller* v. *EBB Auto Co.*:

> A sensible approach would require only enough information about an employee's religious needs to permit the *employer* to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.

8 F.3d 1433, 1439 (9th Cir. 1993) (emphasis added); accord *Brown* v. *Polk County*, 61 F.3d 650, 654 (8th Cir. 1995); *Hellinger* v. *Eckerd Corp.*, 67 F. Supp.2d 1359, 1363-64 (S.D. Fla. 1999); *Hickey*, 2012 WL 3064170 at *7. With such information in hand, the employer and employee can then work out an accommodation that meets the needs of both. But such interactions obviously will not occur under a legal regime—like that articulated by the Tenth Circuit—that gives the potential employer a powerful incentive *not* to undertake that discussion during the hiring process.

Second, the Tenth Circuit's standard unfairly ignores the obvious information asymmetry between an employer and a job applicant. Surely, for example, an employer who sees an applicant wearing religious apparel will generally be in a better position than the applicant to determine whether it is likely to create a religion-work conflict in the employer's own workplace. And the employer's knowledge of that potential—gleaned from the interview itself—is certainly relevant in determining whether a disappointed applicant has established a prima facie case of religious discrimination.

The same is true of scheduling issues: If a potential employer learns during a job interview that an applicant holds beliefs that may create a scheduling issue, that knowledge too should be relevant in determining whether an employer that refused to hire such an applicant did so for reasons of religious discrimination. Yet the Tenth Circuit's holding makes it irrelevant, even for purposes of summary judgment.

The Tenth Circuit's requirement that the employee or applicant identify and articulate a specific, "par-

ticularized" conflict heightens the unfairness. It is often said that the majority of communication is non-verbal. See Albert Mehrabian, Silent Messages: Implicit Communication of Emotions and Attitudes (2nd ed. 1981). And a hyper-technical rule that requires a *verbal* communication of something that has already been effectively conveyed non-verbally is nonsensical and redundant. If the point of the accommodation process is to give the employer a chance to work out a satisfactory accommodation—as it is—that purpose will be served once the employer is aware of the conflict, even if the prospective employee is unable to articulate the conflict in a "particularized" fashion. See, *e.g.*, *Hellinger*, 67 F. Supp.2d at 1363-64.

To be sure, it is fair to expect the employee to inform the employer as soon as the employee learns that a conflict exists. But where the employee never learns of the conflict, there is not only no reason for the employee to provide this information, it is simply impossible. In that circumstance, as in this case, the employer may be the only party in a position to know whether it perceives a conflict between a work rule and a potential employee's religious belief or practice. And if that is true, it is unfair to place on the applicant the burden of discerning and articulating the conflict.

Third, the majority's approach threatens to cripple Title VII's protection against religious discrimination for a wide swath of job applications from the religiously observant. Because an employer is generally more aware of its own job requirements than a job applicant, the employer will usually be in a better position to determine whether a particular religious belief may create a religion-work conflict. But the Tenth Circuit's holding—that the employer's *own* in-

dependent knowledge or notice of an applicant's religious belief is irrelevant to the employee's *prima facie* case—would effectively deny protection to potential employees in all or virtually all such cases.

Indeed, by allowing an employer to act based solely upon a prospective employee's apparent religious conviction—in this case Ms. Elauf's apparent belief in the religious desirability of wearing a headscarf—without making any effort to find a reasonable accommodation, the Tenth Circuit's approach turns Title VII on its head. It results in religious convictions receiving even less protection than other non-protected choices, rather than enforcing the *additional* protections for religious belief that Congress wrote into Title VII. After all, this historic legislation was enacted to provide greater balance in the otherwise asymmetric relationship between employers and employees or applicants, not to somehow protect employers from the religious by placing even greater burdens on believers.

B. The Tenth Circuit's "inflexibility" holding is equally wrong and perverse, and should be expresaly reflected in the Question Presented.

The majority's "inflexibility" requirement also substantially weakens Title VII's accommodation regime—both in the job application context and more generally. Indeed, that requirement would discriminate in favor of adherents to religions that are more commandment-based, i.e., those replete with "thou shalt's" and "thou shalt not's," and against adherents of religions that eschew such absolutes. Similarly, the "inflexibility" requirement treats adherents of the same religion differently depending on the strictness with which they interpret the teachings of their faith.

Absent review and reversal by this Court, moreover, that requirement will govern further proceedings in the district court in this case and, indeed, in all other cases in the Tenth Circuit.

For four reasons, the majority's "inflexibility" requirement merits review. *First*, it is contrary to Title VII's intent and plain language. By its terms Title VII requires accommodation, where it can be done without undue burden, of "*all aspects* of religious observance and practice," not just "observances and practices" that may be considered mandatory. 42 U.S.C. § 2000e(j) (emphasis added). In other words, a religious "observance" or "practice" falls squarely within the accommodation requirement even if it is merely recommended, encouraged or even motivated by one's religious beliefs. To deny protection to such observances and practices is to eliminate much of the protection Title VII was intended to provide, and that its text explicitly provides.

Second, the majority's approach conflicts in principle with other circuits' interpretation of Title VII. In applying that statute, other circuits have merely required that the claimant have a religious belief that creates a conflict with employment duties and is either "bona fide," *Sanchez-Rodriguez* v. *AT & T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 12 (1st Cir. 2012); *Antoine* v. *First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013); *Peterson* v. *Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *Morrissette-Brown* v. *Mobile Informary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007), or "sincere"—and nothing more. *Webb* v. *City of Philadelphia*, 562 F.3d 256, 259 (3rd Cir. 2009); *Tepper* v. *Potter*, 505 F.3d 508, 514 (6th Cir. 2007); *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013); *Harrell* v. *Donahue*, 638

F.3d 975, 979 (8th Cir. 2011). Adding a requirement that the religious belief be "inflexible" or mandatory is thus at odds with the teachings of other circuits.

Third, the Tenth Circuit's decision also conflicts in principle with decisions of other circuits. For example, the Seventh Circuit explicitly rejected the logic of the Tenth Circuit's inflexible religious practice test when it noted in the context of a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") that "a religious believer who does more than he is strictly required to do is nevertheless exercising his religion." *Grayson* v. *Schuler*, 666 F.3d 450, 454 (7th Cir. 2012). As an illustration, the court noted that a "Catholic who vows to obey the Rule of St. Benedict and therefore avoid 'the meat of four-footed animals' is performing a religious observance even though not a mandatory one." *Id.*[7] The D.C.,

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[7] Congress has specified that RLUIPA and the Religious Freedom Restoration Act on which it is based apply to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). That formulation shows that Congress itself views the plain meaning of "exercise of religion" as including religious beliefs that are neither central to nor compelled by any particular "system of religious belief." Given the broad and similar language of Title VII, there is no reason to believe Congress understood the term "religion" as defined there any differently. See also *Korte* v. *Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (noting that "the substantial-burden inquiry does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that"); *Nelson* v. *Miller*, 570 F.3d 868, 878 (7th Cir. 2009) (noting under RLUIPA that "requiring a prisoner to show that his preferred diet is compelled by his religion [is] unlawful"); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is

Second and Eighth Circuits have similarly rejected an "inflexibility" or "mandatory" requirement as to claims directly under the Free Exercise Clause. See *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002) (holding that a "requirement that a religious practice be mandatory to warrant First Amendment protection finds no support in the cases of the Supreme Court or this court"); *Ford* v. *McGinnis*, 352 F.3d 582, 593 (2nd Cir. 2003) (same); *United States* v. *Means*, 858 F.2d 404, 407 (8th Cir. 1988) (test for religious burden is whether plaintiffs have been compelled to "refrain from religiously *motivated* conduct or to engage in conduct that they find objectionable for religious reasons.") (emphasis added).

Fourth, the Tenth Circuit's approach conflicts in principle with this Court's consistent teaching that putting courts in the position of having to choose which beliefs are "central" or mandatory on the one hand, and which are "peripheral" or "flexible" on the other, "cannot be squared with the Constitution or with our precedents, and...would cast the Judiciary in a role that we were never intended to play." *Lyng* v. *Nw. Indian Cemetary Protective Ass'n*, 485 U.S. 439, 458 (1988). Thus, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989). Accord *Employment Division* v. *Smith*, 494 U.S. 872, 886-887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion"). Indeed, as the Second

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claimed to be burdened be central to the adherent's religious belief system.").

Circuit put it in *Ford* v. *McGinnis*, *supra*, "To confine the protection of the First Amendment to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of attempting to resolve intra-faith disputes over religious law and doctrine." That too is a powerful reason to reject the Tenth Circuit's "inflexibility" rule.

* * * * *

The Tenth Circuit majority attempted to justify its conclusions on both the "actual knowledge" and "inflexibility" points by pointing to various decisions of this Court. Yet under the plain language of Title VII, as Judge Ebel pointed out, there is at least a jury question as to whether Abercrombie refused to hire Ms. Elauf because of what Abercrombie itself assumed was and would be her "religious ... practice" of wearing a headscarf. The majority's willingness to let Abercrombie escape any possibility of liability under Title VII for such blatant religious discrimination is a powerful reason for this Court to clarify the case law on which the majority relied in reaching that unfortunate and perverse conclusion.

CONCLUSION

The petition for certiorari should be granted, and the decision below reversed.

Respectfully submitted.

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
General Conference of
Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

CARL H. ESBECK
LEGAL COUNSEL
National Association of Evangelicals
Room 209 Hulston Hall
University of Missouri Law School
Columbia, MO 65211-4190
(573) 882-6543

KIMBERLEE WOOD COLBY
DIRECTOR, CENTER FOR LAW & RELIGIOUS FREEDOM
Christian Legal Society
8001 Braddock Rd., St. 302
Springfield, VA 22151
(703) 642-1070

RICHARD T. FOLTIN
DIRECTOR, NATIONAL & LEGISLATIVE AFFAIRS
American Jewish Committee
1156 15th St. NW, Suite 1201
Washington, DC 20005
(202) 785-5463

ZAINAB AL-SUWAIJ
EXECUTIVE DIRECTOR
American Islamic Congress
1718 M Street NW, #243
Washington, DC 20036
(202) 595-3160

BARBARA WEINSTEIN
DIRECTOR, COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM
Union of Reform Judaism
2027 Massachusetts Ave. NW
Washington, DC 20036
(202) 387-2800

GURJOT KAUR
COUNSEL
The Sikh Coalition
50 Broad Street, St. 1537
New York, NY 10004
(212) 655-3095

AISHA RAHMAN
EXECUTIVE DIRECTOR
KARAMAH: Muslim Women Lawyers for Human Rights
1420 16th St. NW, Suite 300
Washington, DC 20036
(202) 234-7302

AUGUST 2014

APPENDIX

APPENDIX

Interests and Description of Particular *Amici Curiae*

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents more than 76,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,400 congregations with more than 1.1 million members. Observance of the Sabbath is a central tenet of the Seventh-day Adventist church. The Adventist church has a strong interest in seeing that its members and all individuals of faith are protected from workplace discrimination.

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges and independent ministries in the United States. It believes that religious freedom is God-given, and that the government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of safeguarding religious freedom, and believes that this jurisprudential heritage should be carefully maintained.

The Christian Legal Society (CLS) is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, which is essential to a free society, prospers only when the religious liberty of all Americans is protected, regardless of the current popularity of their particular religious beliefs and conduct. Religious individuals' ability to pursue their livelihoods without forfeiting their religious beliefs and conduct, and without being discriminated against based on

those religious beliefs and conduct, lies at the heart of religious liberty.

The American Jewish Committee (AJC) is a global Jewish advocacy organization with over 175,000 members and supporters and was founded in 1906 to protect the civil and religious rights of Jews. AJC has strongly supported the principle that religious discrimination has no place in the workplace.

The Union for Reform Judaism includes 1.3 million Reform Jews in 900 congregations across North America, and (through its affiliate, the Central Conference of American Rabbis) more than 2000 Reform rabbis. The Union is committed to religious freedom, and believes Americans of all faith must be free to follow the dictates of their consciences when it comes to religious expression.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Founded on September 11, 2001, the Sikh Coalition works to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has successfully litigated cases on behalf of Sikh Americans who wear visible articles of faith, including turbans and unshorn hair (and beards), and have been denied employment or fired because of uniform or grooming policies and/or employers' claims of "lack of notice." Unlike some faiths where only the clergy are in uniform, all Sikhs are required to wear external articles of faith such as a steel bracelet (kara), uncut hair and beard (kesh), a

comb (kangha) to care for their hair, and a turban (dastaar) to cover their hair. Globally and in the U.S., these articles of faith distinguish members of the Sikh religion and make them instantly recognizable, similar to a person's race or sex. Through our years of work on behalf of the Sikh community, we have found that qualified Sikh applicants are at a severe disadvantage during the hiring process, unaware or uninformed of dress code or grooming policies, and frequently victimized by an employer's willful failure to engage in an interactive religious accommodation process.

KARAMAH: Muslim Women Lawyers for Human Rights is a nonprofit organization committed to promoting human rights globally, especially gender equity, religious freedom and civil rights in the United States. It pursues its mission through education, legal outreach and advocacy.

The American Islamic Congress (AIC) serves both Muslims and Non-Muslims through the promotion of civil and human rights, including religious freedom. Its programs have reached tens of thousands of people in 40 U.S. states and across the globe. AIC recognizes that American Muslims have prospered under this country's tradition of religious tolerance, and that American Muslims must champion and protect such tolerance for people of all faiths.

No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

DONALD B. VERRILLI, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record
for Petitioner

SHAY DVORETZKY
Jones Day
51 Louisiana Ave., N.W.
Washington, D.C. 20001-2113
sdvoretzky@jonesday.com
(202) 879-3474

Counsel of Record
for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED: JULY 25, 2014
CERTIORARI GRANTED: OCT. 2, 2014

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket No. 11-5110

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

ABERCROMBIE & FITCH, AN OHIO CORPORATION, D/B/A
ABERCROMBIE KIDS, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
7/26/11	[9887749] Civil case docketed. Preliminary record filed. DATE RECEIVED: 07/26/2011. Docketing statement, transcript order form and notice of appearance due 08/09/2011 for Abercrombie & Fitch. Notice of appearance due on 08/09/2011 for Equal Employment Opportunity Commission.
	* * * * *
12/8/11	[9925028] Appellant/Petitioner's brief filed by Abercrombie & Fitch. 7 paper copies to be provided to the court. Served on 12/08/2011 by ECF/NDA. Oral argument requested? Yes. MAK
12/8/11	[9925362] Appendix filed by Appellant Abercrombie & Fitch. Original and 1 copy. Appendix pages: 724. Number of volumes: 6. Hard-copy only. Served on 12/08/2011. Manner of Service: US mail.

DATE	PROCEEDINGS
	* * * * *
1/20/12	[9935672] Appellee/Respondent's brief filed by EEOC. 7 paper copies to be provided to the court. Served on: 01/20/2012. Manner of service: email. Oral argument requested? Yes.—[Edited 05/02/2012 by SDS to attach errata sheets to entry] JMT
1/20/12	[9936725] Appellee's Supplemental Appendix filed by Appellee EEOC. Original and 1 copy. Appendix pages: 184. Number of volumes: 1. Hardcopy only. Served on 01/20/2012. Manner of Service: US mail.
	* * * * *
2/10/12	[9941506] Appellant/Petitioner's reply brief filed by Abercrombie & Fitch. 7 paper copies to be provided to the court. Served on 02/10/2012. Manner of Service: ECF/NDA. [11-5110] MAK
	* * * * *
5/7/12	[9965072] Case argued by Mark Knueve for appellant; James Tucker for appellee and submitted to Judges Kelly, Ebel and Holmes. [11-5110]
	* * * * *
10/1/13	[10113039] Reversed. Terminated on the merits after oral hearing. Written, signed, published. Judges Kelly, Ebel (concurring in part and dissenting in part) and Holmes (authoring). Mandate to issue. [11-5110]
10/1/13	[10113043] Judgment for opinion filed. [11-5110]

DATE	PROCEEDINGS

* * * * *

12/4/13 [10130255] Petition for rehearing, for rehearing en banc filed by EEOC. Original and 12 copies. Served on 12/04/2013. Manner of Service: email. [11-5110]

12/6/13 [10131011] Order filed by Judges Kelly, Ebel and Holmes directing appellant to file a response to petition for rehearing, petition for rehearing en banc. Response due on 12/16/2013 for Abercrombie & Fitch. Served on 12/06/2013. [11-5110]

* * * * *

12/10/13 [10132095] Amicus Curiae brief filed by National Employment Lawyers Association in support of EEOC's petition for rehearing. 7 paper copies to be provided to the court. Served on 12/10/2013. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [11-5110]—[Edited 12/12/2013 by SLS to add filing party to docket text.]—[Edited 02/26/2014 by SLS to show the brief as filed.] MH

* * * * *

12/11/13 [10132439] Amicus Curiae brief filed by General Conference of Seventh-Day Adventists, National Association of Evangelicals, Christian Legal Society, American Civil Liberties Union Foundation, Baptist Joint Committee for Religious Liberty, American Jewish Committee, and The Sikh Coalition. 12 paper copies to be provided to the court.

DATE	PROCEEDINGS
	Served on 12/11/2013. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [11-5110]—[Edited 12/12/2013 by SLS to correct parties in docket text.]—[Edited 02/26/2014 by SLS to show the brief as filed.] CMK
12/16/13	[10133613] Response filed by Abercrombie & Fitch to Appellee's Petition for Rehearing En Banc. Served on 12/16/2013. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [11-5110] DJC
2/26/14	[10152461] Order filed by Judges Briscoe, Kelly, Lucero, Hartz, Tymkovich, Gorsuch, Holmes, Matheson, Bacharach and Phillips regarding appellee's petition for rehearing en banc, the response, and the two proposed amicus briefs. The request of the proposed amicus parties to file briefs on rehearing is granted. The implicit request for panel rehearing is denied. Judge Ebel would grant panel rehearing. A poll was requested and the active judges split evenly. Accordingly, the petition for rehearing en banc is denied. Chief Judge Briscoe, as well as Judges Lucero, Matheson, Bacharach and Phillips voted to grant en banc rehearing. Judge Hartz has written separately. [11-5110]
3/6/14	[10154977] Mandate issued. [11-5110]
5/22/14	[10178276] Supreme Court order extending the time to file a petition for a writ of certiorari to

DATE	PROCEEDINGS
	6/26/14 filed. [11-5110]
6/19/14	[10185099] Supreme Court order granting further extension of time 7/25/14. [11-5110]
7/31/14	[10195280] Petition for writ of certiorari filed by Equal Employment Opportunity Commission on 07/25/2014. Supreme Court Number 14-86. [11-5110]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(Tulsa)

Civil Docket No. 4:09-cv-00602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN
OHIO CORPORATION DOING BUSINESS AS ABERCROMBIE
KIDS, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
9/17/09	2	COMPLAINT with Jury Demand against Abercrombie & Fitch Stores, Inc. by Equal Employment Opportunity Commission (Robertson, Michelle) (Entered: 09/17/2009)
		* * * * *
11/24/09	7	ANSWER (Re: 2 Complaint) by Abercrombie & Fitch Stores, Inc. (Brightmire, Kristen) (Entered: 11/24/2009)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/15/11	50	MOTION for Summary Judgment by Abercrombie & Fitch Stores, Inc. (With attachments) (Fungsang, Joseph) (Entered: 04/15/2011)
		* * * * *
4/26/11	68	MOTION for Partial Summary Judgment *with brief in support* by Equal Employment Opportunity Commission (With attachments) (Lee, Jeff) (Entered: 04/26/2011)
		* * * * *
5/6/11	77	RESPONSE in Opposition to Motion (Re: 50 MOTION for Summary Judgment) by Equal Employment Opportunity Commission; (With attachments) (Seely, Barbara) (Entered: 05/06/2011)
		* * * * *
5/6/11	86	RESPONSE in Opposition to Motion (Re: 68 MOTION for Partial Summary Judgment *with brief in support*) by Abercrombie & Fitch Stores, Inc., (With attachments) (Fungsang, Joseph) (Entered: 05/06/2011)
		* * * * *
5/20/11	97	REPLY to Response to Motion (Re: 68 MOTION for Partial Summary Judg-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment *with brief in support*) by Equal Employment Opportunity Commission; (With attachments) (Hope, Jennifer) (Entered: 05/20/2011)
		* * * * *
5/20/11	103	REPLY to Response to Motion (Re: 50 MOTION for Summary Judgment) by Abercrombie & Fitch Stores, Inc.; (Fungsang, Joseph) (Entered: 05/20/2011)
		* * * * *
6/29/11	118	MINUTES of Proceedings—held before Judge Gregory K Frizzell: Motion Hearing held on 6/29/2011, striking/terminating deadline(s)/ Hearing(s) (Re: 50 MOTION for Summary Judgment, 68 MOTION for Partial Summary Judgment *with brief in support*) (Court Reporter: Glen Dorrough) (hbo, Dpty Clk) (Entered: 06/29/2011)
6/30/11	119	TRANSCRIPT of Proceedings (Unredacted) of motion hearing (an excerpt) held on 06/29/2011 before Judge Gregory K Frizzell (Court Reporter: Glen Dorrough) (Pages: 1-11). NOTICE RE REDACTION OF TRANSCRIPTS: A party must file a Tran-

DATE	DOCKET NUMBER	PROCEEDINGS
		script Redaction Request within 21 calendar days. If a party fails to request redaction, this unredacted transcript may be made electronically available to the public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may view the transcript at the court public terminal at no charge or may purchase a copy from the court reporter. (Re: 118 Minutes of Motion Hearing, Striking/ Terminating Deadline(s)/Hearing(s)) (grd, Crt Rptr) Modified on 9/29/2011 to remove transcript access restriction (a-hc, Dpty Clk). (Entered: 06/30/2011)
		* * * * *
7/5/11	124	TRANSCRIPT of Proceedings (Unredacted) of motion hearing held on 06/29/2011 before Judge Gregory K Frizzell (Court Reporter: Glen Dorrough) (Pages: 1-94). NOTICE RE REDACTION OF TRANSCRIPTS: A party must file a Transcript Redaction Request within 21 calendar days. If a party fails to request redaction, this unredacted transcript may be made electronically available to the

DATE	DOCKET NUMBER	PROCEEDINGS
		public without redaction after 90 calendar days. Any party needing a copy of the transcript to review for redaction purposes may view the transcript at the court public terminal at no charge or may purchase a copy from the court reporter. (Re: 118 Minutes of Motion Hearing, Striking/Terminating Deadline(s)/Hearing(s)) (grd, Crt Rptr) Modified on 10/3/2011 to remove transcript access restriction (a-hc, Dpty Clk). (Entered: 07/05/2011)
		* * * * *
7/13/11	152	OPINION AND ORDER by Judge Gregory K Frizzell; denying 50 Motion for Summary Judgment; granting 68 Motion for Partial Summary Judgment (hbo, Dpty Clk) (Additional attachment(s) added on 7/13/2011: # 1 "main document") (hbo, Dpty Clk). Modified on 7/13/2011 to attach correct order (hbo, Dpty Clk). (Additional attachment(s) added on 7/18/2011: # 2 ""main document"") (hbo, Dpty Clk). Modified on 7/18/2011 to correct clerical error only (hbo, Dpty Clk). (Entered: 07/13/2011)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/18/11	161	MINUTES of Proceedings—held before Judge Gregory K Frizzell: Voir Dire/Jury Selection began (Court Reporter: Glen Dorrough) (hbo, Dpty Clk) (Entered: 07/18/2011)
7/18/11	162	MINUTES of Proceedings—held before Judge Gregory K Frizzell: Voir Dire/Jury Selection held on 7/18/2011 (Court Reporter: Glen Dorrough) (hbo, Dpty Clk) (Entered: 07/18/2011)
7/18/11	163	MINUTES of Proceedings—held before Judge Gregory K Frizzell: Jury Trial began (Court Reporter: Glen Dorrough) (hbo, Dpty Clk) (Entered: 07/18/2011)
7/18/11	164	MINUTES of Proceedings—held before Judge Gregory K Frizzell: Jury Trial held, setting/resetting deadline(s)/ hearing(s): (Jury Trial set for 7/19/2011 at 09:30 AM before Judge Gregory K Frizzell) (Court Reporter: Glen Dorrough) (hbo, Dpty Clk) (Entered: 07/18/2011)
		* * * * *
7/19/11	167	MINUTES of Proceedings—held before Judge Gregory K Frizzell: Jury Trial held, setting/resetting deadline(s)/ hearing(s): (Jury Trial set for

DATE	DOCKET NUMBER	PROCEEDINGS
		7/20/2011 at 09:00 AM before Judge Gregory K Frizzell) (Court Reporter: Glen Dorrough) (hbo, Dpty Clk) (Entered: 07/20/2011)
7/20/11	169	JURY INSTRUCTIONS by Judge Gregory K Frizzell (hbo, Dpty Clk) (Entered: 07/21/2011)
7/20/11	170	JURY VERDICT for Plaintiff and against Defendant (hbo, Dpty Clk) (Entered: 07/21/2011)
		* * * * *
7/21/11	171	JUDGMENT by Judge Gregory K Frizzell, entering judgment in favor of Plaintiff against Defendant (terminates case) (hbo, Dpty Clk) Modified on 3/11/2014—**VACATED per 201** (sac, Dpty Clk). (Entered: 07/21/2011)
7/21/11		* * * Civil Case Terminated (see document number 171) (sac, Dpty Clk) (Entered: 07/22/2011)
7/25/11	172	NOTICE OF APPEAL to Circuit Court (paid $455 appeal fee; receipt number 1085-887180) (Re: 171 Judgment, Entering Judgment 152 ORDER AND OPINION 143 MINUTES) by Abercrombie & Fitch Stores, Inc. (Brightmire, Kristen) Modified on 7/26/2011 to create link to 152

DATE	DOCKET NUMBER	PROCEEDINGS
		and 143 (sac, Dpty Clk). (Entered: 07/25/2011)
7/26/11	173	PRELIMINARY RECORD Sent to Circuit Court (Re: 172 Notice of Appeal to Circuit Court,) (With attachments) (sac, Dpty Clk) (Entered: 07/26/2011)
		* * * * *
8/2/11	176	Unopposed MOTION to Stay *Execution of Judgment* by Abercrombie & Fitch Stores, Inc. (Fungsang, Joseph) (Entered: 08/02/2011)
8/3/11	177	ORDER by Judge Gregory K Frizzell *Stay of Execution of Judgment*; granting 176 Motion to Stay (hbo, Dpty Clk) (Entered: 08/03/2011)
		* * * * *
10/4/11	191	CLERK'S RECORD on Appeal Sent to Circuit Court (Re: 172 Notice of Appeal to Circuit Court,) (s-srt, Dpty Clk) (Entered: 10/04/2011)
		* * * * *
10/1/13	194	DECISION from Circuit Court reversing the Decision of the District Court (awaiting mandate) (Re: 172 Notice of Appeal to Circuit Court,) (sdc, Dpty Clk) (Entered: 10/01/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
10/1/13	195	ORDER from Circuit Court *entering Judgment* (Re: 172 Notice of Appeal to Circuit Court,) (sdc, Dpty Clk) (Entered: 10/01/2013)
		* * * * *
3/6/14	198	MANDATE from Circuit Court reopening case (Re: 194 Decision from Circuit Court, 172 Notice of Appeal to Circuit Court,) (sdc, Dpty Clk) (Entered: 03/06/2014)
		* * * * *
3/10/14	201	JUDGMENT by Chief Judge Gregory K Frizzell *Judgment on Remand*, entering judgment in favor of Defendant against Plaintiff (terminates case) (Re: 195 Order from Circuit Court, 194 Decision from Circuit Court, 198 Mandate from Circuit Court) (hbo, Dpty Clk) (Entered: 03/10/2014)
3/10/14		* * * Civil Case Terminated (see document number 201) (sac, Dpty Clk) (Entered: 03/11/2014)
		* * * * *
3/28/14	205	Unopposed MOTION to Stay *Execution of Judgment* by Equal Employment Opportunity Commission (Lee, Jeff) (Entered: 03/28/2014)

DATE	DOCKET NUMBER	PROCEEDINGS
3/31/14	206	ORDER by Chief Judge Gregory K Frizzell; granting 205 Motion to Stay (Re: 201 Judgment,,,, Entering Judgment,) (hbo, Dpty Clk) (Entered: 03/31/2014)
		* * * * *
5/22/14	208	LETTER from Circuit Court regarding Supreme Court order extending the time to file a petition for a writ of certiorari to 6/26/14 (Re: 172 Notice of Appeal to Circuit Court,) (sdc, Dpty Clk) (Entered: 05/22/2014)
6/19/14	209	LETTER from Circuit Court regarding Supreme Court order granting further extension of time (Re: 172 Notice of Appeal to Circuit Court,) (sdc, Dpty Clk) (Entered: 06/19/2014)
7/13/14	210	LETTER from Circuit Court stating that the Petition for Writ of Certiorari has been filed (U.S. Supreme Court Case Number: 14-86) (Re: 172 Notice of Appeal to Circuit Court,) (sc, Dpty Clk) (Entered: 07/31/2014)

UNITED STATES DISTRICT COURT
FOR THE NOURTHERN DISTRICT OF OKLAHOMA

No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION D/B/A ABERCROMBIEKIDS, DEFENDANT

Jan. 4, 2011

DEPOSITION OF SAMANTHA ELAUF

---

* * * * *

[4]

(Whereupon; the deposition began at 8:50 a.m.)

SAMANTHA ELAUF

having first been duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. KNUEVE:

Q. Can you state your full name?

A. Samantha Iman Elauf.

* * * * *

[26]

Q. As I understand, there's—well, would you agree with me that there is some—that different Muslims believe different things about what they have to wear, different Muslim women believe different things about what they have to wear or no?

A. Well, every Muslim believes the same as in what the Quran says, but at the same time there's different levels of what they may think is priority and what someone else may think is not priority, like not necessarily priority.

Q. What does the Quran say about how women should dress?

A. Modest.

Q. Would you agree that the Quran does not specifically require a headscarf?

A. It does say that women are supposed to cover their hair.

[27]

Q. Okay. You're positive about that?

A. No, I'm not 100 percent positive but—

Q. Okay. Now, I read that some—at least some Muslim women believe that they should cover everything except for the hands and the face. Is that what you believe?

A. No, not fully, but that's for the most part everything that is showing, my hands and my—

Q. Where do you differ from that?

A. I guess the way that I wear my headscarf isn't necessarily the same as other girls, whereas my neck shows.

Q. You testified that the Quran requires modesty in dress for women.

A. Modesty, yes.

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[31]

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Q. And how long have you been wearing a headscarf?

A. Since I was thirteen.

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[32]

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Q. And what led you to your decision to begin wearing a headscarf?

A. I just felt like it was—one day I just decided that I wanted to start wearing a headscarf to represent who I was as far as my faith.

Q. Have there been periods of time—so it was seven years ago?

A. Yes, because I am twenty.

Q. So in that seven years have you continuously worn the headscarf?

A. Yes. There hasn't been a day where I went out in public and haven't worn a headscarf.

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[44]

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Q. What made you decide to apply at Abercrombie?

A. I was working at Limited Too, and I was kind of burned out on the job just because I worked there for a while so I wanted a new job, and my friend worked there, so I thought it would be fun.

Q. And your friend was Farisa?

A. Farisa.

Q. Had Farisa worked with you at Limited Too?

A. No.

Q. Did you wear your headscarf when you were employed at Limited Too?

A. Yes.

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[45]

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Q. So what did Farisa say about Abercrombie?

A. Well, she also had worked there for a while and she just told me she liked working there and I [46] should come apply there.

Q. Did you know anybody else that was working there?

A. Yeah. I knew some of the sales associates.

Q. Who else did you know?

A. There was a boy named Andrew and Spencer, and there was some other people but it wasn't I knew them like personally. Just whenever I would go in there, I would see them and talk to them.

Q. Now, at this time you were in high school?

A. I had just graduated high school because it was the summer of 2008, so I just graduated.

Q. Did you know anybody else who was Muslim that was working at Abercrombie?

A. Not that I know of, not at the one I applied at.

Q. Okay. Now by this point, how did you know Kalen?

A. I didn't know him personally. It was just by me going in there because me and Farisa both worked at the mall for a while, so if she were to go on break or if I were to go on break, we would meet up with each other, but I never knew him personally. It was just me going into Abercrombie.

Q. Okay. So is it fair to say that the people [47] that you knew at Abercrombie before you applied were Farisa, you'd had this one conversation with Kalen, and then you knew Andrew and Spencer but it sounds like not very well?

A. I knew them from Farisa, yeah, I knew them from Farisa.

Q. Did Farisa tell you that there was a look policy at Abercrombie?

A. No. She told me about what they were supposed to wear as far as like how every so often they would have color stories that they were supposed to follow but not that there was a policy.

Q. Do you know what position Farisa held?

A. Sales associate, which they called model.

Q. What did you—had you ever shopped at Abercrombie before?

A. Yeah, I did shop at Abercrombie.

Q. Okay. So you knew a little bit about the style of clothing?

A. What kind of clothes they would sell, yes.

Q. And they sell clothes that are form fitting?

A. Yeah.

Q. And they sell clothes that are body conscious?

A. Not necessarily everything is body conscious. I don't know. I mean they would sell like [48] button-up shirts, tank tops that you are supposed to wear underneath them, zip-up jackets, sweatshirts, long-sleeved shirts, t-shirts. I mean, I understand that they're all tight, but it's not anything I wouldn't be able to wear.

Q. Besides wearing the headscarf, do you wear certain clothes or clothes in a certain way because of your religion?

A. I try not to wear clothes too tight but I still wear normal clothes.

Q. Do you wear clothes that would reveal, for example, your arm from your elbow to your wrist?

A. No. I try to cover the majority of my arm.

Q. And you mentioned earlier that you wouldn't wear skirts or shorts?

A. I would wear a skirt but I usually wear leggings with them. Like I work at Forever 21 now, and like we have tutu days where we wear a tutu skirt. I would wear like tights under my tutu skirt.

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[49]

Q. Okay. So we are talking a little bit about Abercrombie before the break, and I think you testified that you had shopped at Abercrombie before you applied for employment there.

A. Uh-huh.

Q. Yes?

A. Yes.

Q. Have you ever bought any clothes from Abercrombie?

A. Yes.

Q. Can you—did you buy clothes often from Abercrombie?

A. The majority of that clothing I would buy from there was their jeans. I liked the way their jeans fit,

and I bought of lot of their sweatshirts at Abercrombie and tank tops from there and their T-shirts, but it wasn't like my entire closet was Abercrombie.

Q. Right. Do you still shop at Abercrombie?

A. No.

Q. When's the last time you've been in an Abercrombie store?

A. The last time? I haven't been in an Abercrombie store since this case was filed.

Q. Okay. Now, you knew—Farisa told you her [50] job position was model?

A. Yes.

Q. And she also told you that she had to wear certain clothes in the position?

A. Not certain clothes, just certain like colors, like you have to wear navy blue and white or cream and brown, but it wasn't like certain pieces of clothing.

Q. Did she tell you that part of the job of the model was to model the Abercrombie style?

A. She told me that she was supposed to look like their clothes but she didn't have to wear Abercrombie clothing.

Q. Okay. So she was supposed to look like the Abercrombie style?

A. She was supposed to wear things like they would sell, yes.

Q. Are you aware—let me strike that. Were you aware at the time that Abercrombie did no advertising other than the in-store experience?

A. Say it again.

Q. Have you ever seen a commercial for Abercrombie on the television?

A. No.

Q. Have you ever seen an ad for Abercrombie in a [51] newspaper or a magazine?

A. Not before I applied there.

Q. Okay. Did anybody tell you that Abercrombie did no advertising other than what customers saw when they walked into the store?

A. No, I never heard that.

Q. Did you know anything else about Abercrombie before you applied?

MS. SEELY: Objection, vague and ambiguous.

Q. You can answer the question.

A. Did I know anything about Abercrombie, like as in a company or as in what clothes they would sell or what?

Q. Either one.

A. I knew it was a fashion-forward store, but that was about it.

Q. You applied at an electronic kiosk?

A. In the upstairs one, so the Abercrombie Fitch, yes.

Q. And do you recall that there was a job description on the kiosk for the model position?

A. It said model, yeah.

Q. Do you recall a description of the job on the kiosk?

A. No.

[52]

Q. Let's get this marked. Okay. Miss Elauf, you have Exhibit 1 there in front of you.

A. Okay.

Q. Is this a copy of your application for employment with Abercrombie?

A. Yes.

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[53]

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Q. How long—do you remember how long after you applied you were interviewed?

A. It wasn't very long after.

Q. Did anybody talk to you when you were applying at the kiosk?

A. No. I was just greeted when I came into the [54] store but not while I was filling out the application.

Q. Did anybody talk to you after you submitted the application in the store?

A. No.

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[56]

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Q. So you submitted the application. What was the first conversation you had with somebody after you submitted the application?

A. It was with Farisa basically just about the application, and then she told me she was going to talk to Heather and see as soon as like they could do the interview. That's why I'm not sure if I had the interview when it said on the application or if Heather called me to come in for an interview.

Q. Okay. Before—you eventually had an interview with Heather Cook?

A. Yes.

Q. Before the interview with Heather Cook, had you talked with anybody about whether you would be allowed to wear a headscarf while working at Abercrombie?

A. The only thing that Farisa had talked to me about was they had no black policy, and I usually did wear a black headscarf, so she had asked the managers if it was okay if I wore a black headscarf.

Q. Okay. So did you know before your interview [57] that Abercrombie's practice was no black clothes were allowed?

A. Yeah, I knew they weren't allowed to wear black.

Q. And you knew that before you were interviewed?

A. Yes.

Q. And then you discussed that with Farisa?

A. Discussed what we weren't allowed to wear black?

Q. Right.

A. Yeah. She told me they weren't allowed to wear black.

Q. And she told you that she discussed that with somebody else?

A. Yeah. She told me that she asked Heather if it was okay if I wore a black headscarf, and they just said, oh, she would probably have to wear a different color, which I was fine with.

Q. Okay. So Farisa told you she had a conversation with Heather Cook?

A. Yes.

Q. And Farisa told you that Heather said she would have to wear a different color than black?

A. Yes.

Q. Did Farisa tell you anything else about this [58] conversation with Heather?

A. No.

Q. Did you ever talk to Heather about that conversation with Farisa?

A. No.

Q. Okay, and did you ever see anything—your only source of knowledge about this conversation between Farisa and Heather is what Farisa told you?

A. As far as the black—wearing a black headscarf?

Q. Right. This whole conversation about it.

A. Yeah, I wasn't there.

Q. You don't have any other independent knowledge about that conversation; correct?

A. Right.

Q. I'm going to show this document to you and we may get it marked later. There is a portion in there that's highlighted, which states job description. Did you see that on the kiosk when you applied?

A. I don't remember.

Q. So you might have seen it but you just don't remember; is that true?

A. Yeah, it may have been there but I don't remember seeing it.

[59]

Q. Okay. Did you ever get a handbook from Abercrombie?

A. No.

Q. Did Farisa ever show you a handbook?

A. No.

Q. Did you ever—do you know that Abercrombie has a look policy?

A. I do now.

Q. Okay. Before you applied, did you know Abercrombie had a look policy?

A. No.

Q. Did you—have you ever seen the look policy?

A. After the case was filed, yes.

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[61]

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Q. Okay. What did she tell you about the position?

A. Basically what I would be doing and the shifts.

Q. Did she tell you that in the model position that you would be modeling this Abercrombie style?

A. I think so, yes.

Q. Did she tell you that there was a look policy—in the opening script, did she tell you that there was a look policy that applied?

A. No, she never said anything about a look policy.

Q. Did she say you would have to wear the style of clothes that Abercrombie sold?

A. She told—I remember she told me what I was [62] wearing that day would be fine but I would just have to wear a different color scarf because I think I was wearing a black scarf and I was wearing black sandals, and you weren't allowed to wear black shoes or—

Q. Okay. It's your testimony under oath that Heather told you what you were wearing that day would be fine?

A. I'm pretty sure, yes.

Q. Well, when you say you're pretty sure, I'm asking you do you specifically remember that?

A. I don't want to say I'm 100 percent sure, but I know I was told that it was fine.

Q. Well, remember, you had a conversation with Farisa where Farisa said that it would be fine.

MS. SEELY: Objection, vague and ambiguous. What is it?

MR. KNUEVE: The headscarf.

A. No. I'm talking about my outfit, like my clothes I was wearing.

Q. Okay. Well, tell me exactly what you remember that Heather said.

A. In the interview?

Q. Uh-huh.

A. Well, I remember her telling me about the job [63] position and then asking me about my job that I had at Limited Too, just like what my responsibilities were, and then she asked me what diversity meant to me, and she told me how they weren't supposed to wear a lot of makeup, they were supposed to look natural, and they weren't allowed to wear fingernail polish. Those are the things I'm 100 percent sure.

Q. Okay, and you went to the interview wearing a headscarf?

A. Yes.

Q. And the headscarf was black?

A. Yes.

Q. Even though Farisa had told you that you would not be allowed to wear black?

A. Yes.

Q. During the interview, you never discussed the fact that you were Muslim?

A. No.

Q. She never asked you whether you were Muslim?

A. Nope.

Q. Did she ask you if you could ask—did she tell you that you could ask any questions during the interview?

A. She asked me if I had any questions at the end.

[64]

Q. Did you tell her you had any questions?

A. Nope.

Q. Okay. Turn to Page 8 of Exhibit 2.

MS. SEELY: Are you talking about Bates stamp No. 21?

MR. KNUEVE: Yes.

Q. And you'll see there's a section there entitled closing statement?

A. Oh okay.

Q. And there's in particular there's a section on the look policy, and I'd like you to read that and let me know when you've finished.

A. (Witness complied).

Q. Did Heather read that during the interview?

A. I don't know if she read it or if she just read parts of it.

Q. Certainly she talked about the look policy in the interview; correct?

MS. SEELY: Objection, vague and ambiguous. I think the witness has testified that she talked about what the witness could and could not wear in terms of makeup, but the witness has already testified there was no conversation about the look policy.

MR. KNUEVE: You've stated your objection. [65] I don't appreciate speaking objections.

Q. You can answer the question. She certainly mentioned the look policy; correct?

A. She never said the look policy, but she stated parts of the look policy as in I would wear clothing that either looked like Abercrombie and then the fact that I wasn't supposed to wear heavy makeup or like polish, nail polish.

Q. Did she state anything else?

A. Not that I can recall.

Q. Okay, and then after she told you all that, she said do you have any questions, and you said no; correct?

A. Yes.

Q. All right. Now, earlier I thought you had said something about there being a discussion about your headscarf during the interview, but there was no discussion about your headscarf during the interview?

A. She never said I wouldn't be able to wear it or anything like that.

Q. And you never brought it up either?

A. No.

Q. It just wasn't discussed during the interview?

A. Right.

[66]

Q. Okay. What, if anything, did Heather say at the end of the interview?

A. She told me that she would be calling me the next day or the day after and let me know when orientation was.

Q. Do you have Exhibit 4 there in front of you?

A. Yes.

Q. Have you ever seen Exhibit 4 before?

A. No.

Q. Did you ever ask to see a job description for the model position?

A. No.

Q. Okay. After the interview, what was the next thing that happened relating to your application for employment?

A. The next day and another day had passed. I'm pretty sure the interview was on a Thursday, and it was Sunday and Farisa was going to work, and she asked me if I had gotten a call back from Abercrombie letting me know for orientation, and I told her no. So she told me when she was going to go into work, she was going to ask what had happened. When she went into work, she was told by the managers that Heather had called or had let the district manager, Randall, know that she was [67] planning on hiring me and that I wore a headscarf. Whenever she told him that, he told her that she wasn't to hire me because I did wear a headscarf, and I guess she asked why, and he said I didn't fit the Abercrombie image and that they had the no black policy, and she told him that I would wear another color, I didn't have to wear black.

Q. Who said that; who said you would wear another color?

A. Heather because her and Farisa had talked about it, and I guess he told her there's no question about it, she can't work here wearing a thing on her head.

Q. Now, this was a conversation you had with Farisa?

A. No, I didn't have this conversation.

Q. Well, you found out this information somehow?

A. Yeah, from Farisa.

Q. Was this a telephone call or was this an in-person conversation?

A. Over the telephone.

Q. All right, and what day was it?

A. Sunday.

Q. All right. So you believed that the interview was Thursday and you had a phone call with Farisa on [68] Sunday?

A. Yes.

Q. And Farisa told you everything that you just mentioned?

A. Yes.

Q. Did she say which managers she had talked to?

A. She said that she had talked to all of them because I guess all of them had been working, and there was only three, Heather, Andrew and Kalen. The store manager was Andrew.

Q. Okay. How long did that conversation last?

A. With Farisa?

Q. Uh-huh.

A. I don't know how long it lasted.

Q. Did you ask any questions?

A. I just asked like who told her.

Q. And she said Heather, Andrew and Kalen?

A. She said that Heather talked to Randall. I'm pretty sure that she said every single one of them had discussed what happened because they were all aware. It was in their store.

Q. Okay. Did you say anything?

A. To Farisa, I just said I can't believe that.

Q. Did you tell Farisa to do anything?

A. No

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[117]

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Q. And you know Abercrombie does not sell headscarves; correct?

A. Yes, I know that. They sell scarves but this wasn't sold as a headscarf.

Q. Well Abercrombie doesn't sell anything—does Abercrombie sell anything that could be worn as a headscarf to your knowledge?

A. They sell scarves.

Q. Do they sell anything that could be worn as a headscarf to your knowledge?

A. Yes, I've seen scarves that I could wear as a headscarf.

Q. What scarf?

MS. SEELY: Objection, vague and ambiguous.

A. A scarf from Abercrombie.

Q. When did you see that?

A. When I've shopped there, I've seen scarves that could have been worn as a headscarf.

Q. And when was that?

A. Not recently since I haven't been in the store in two years, but I've seen scarves that could have been worn as a headscarf, like the one I'm wearing [118] today.

Q. Now, would you agree that those scarves were not designed to be worn as headscarves?

MS. SEELY: Objection, no foundation.

A. I don't think the scarf I'm wearing today was designed to be worn as a headscarf. That doesn't mean I can't wear it as a headscarf.

Q. Where did you get the headscarf?

A. That I'm wearing today?

Q. Uh-huh.

A. From Forever 21.

Q. You've never seen anybody wearing a headscarf at an Abercrombie store; correct?

A. No, I have not.

Q. You've never seen anybody wearing any kind of headwear at an Abercrombie store; correct?

A. I don't know. I don't know if I've ever seen them wear hats or anything but not that I recall, no.

Q. Now, from our discussion earlier, one thing that jumped out at me is some people who are practicing Muslims wear headscarves and some don't, is that correct?

A. Correct.

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[123]

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Q. Would you agree that the headscarf—you've already stated the headscarf is a symbol of modesty; correct?

A. Yes.

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[130]

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Q. Do you believe that the hijab is—well, you've said the hijab is about modesty; correct?

A. (Witness nods head up and down).

Q. Do you believe it's about attracting as little attention as possible?

A. It's attracting as little attention as possible from men.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANTS

Jan. 20, 2011

DEPOSITION OF KALEN BRYCE MCJILTON

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[49]

Now, under the look policy, is it your understanding that models did not have to wear actual Abercrombie clothes?

A. Yeah, as long as it didn't have a competitor's logo, you could wear it.

Q. You could wear it. So they could wear any kind of clothing they wanted to as long as it looked like Abercrombie?

A. Yes. It had to resemble Abercrombie's look and it couldn't be black. Like we weren't allowed to wear black clothes.

Because Abercrombie didn't sell it; so we were not allowed to wear it because it was obviously [50] not from our store.

Q. Describe to me what you mean when you say they had to wear clothing in the Abercrombie look. What's the Abercrombie look to you?

A. Ummm—

Q. Besides the moose?

A. Yeah. Just kind of like a casual—like a casual look, I guess. I don't—I mean—casual to like—almost like a preppy look.

I don't really know how else to explain it. It's there. There's like a way it looks, but I honestly don't —I'm not sure.

Q. Okay.

And within this—the confines of the look policy that they had to dress in a manner that was like the Abercrombie look, could the models choose each day what they wanted to wear as long as it looked like the clothing that Abercrombie sold?

A. I mean, we had like key colors, and so forth, that we were, you know, asked to adhere to.

But that was more so like when we were being visited by like our—you know like uppers and so forth just to kind of show that we were, you know, like maintaining our look.

But for the most part, it was—yeah, you

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANT

Mar. 17, 2011

DEPOSITION OF DEON RILEY

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* * * * *

[4]

Q. Could you state your full name for the record, please?

A. Deon Riley.

Q. And what is your title with Abercrombie & Fitch?

A. Group vice president, human resources, stores.

* * * * *

[18]

And my other question was with regard to that were – during 2008, were both the model employees and the impact associates subject to The Look Policy of Abercrombie?

A: Yes.

Q: And can you tell me approximately how many employees are subject to the Look Policy in 2010?

A: All models, impact, and anyone who works in stores.

* * * * *

[19]

Q. Can you describe to me all forms of advertising, marketing done by defendant?

A. Our largest advertising is our in-store experience with our models, the look and feel of the store, what the customer has come to expect. We do very little external. Based on what you have lined out in No. 7, Facebook. There is no advertising on Facebook. People choose to join the Abercrombie team, so there is—it's really chatter.

Email. You have to sign up for e-mail in order to get anything. And I was not quite sure what other "Internet media" meant.

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[29]

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Q. I know you haven't been asked this before, but could you tell me what The Look Policy is for Abercrombie?

A. Our Look Policy is a policy in place that is the core part of our in-store experience. It [30] gives guidelines on how all our employees should be attired and what's expected of them in terms of their being able to model our style, which is part of their job role.

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[31]

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Q. And why is The Look Policy important to your stores for Abercrombie?

A. As we discussed before, we do little or no advertising. Our advertising is the experience that that particular customer has when they enter the store as well as what their expectation is from us as a brand. The Look Policy is a core piece of it because our models and managers are expected to be in our style, and this is one of our main ways a customer gets to see our style. We firmly believe that it leads to a better in-store experience and it means customers will return or purchase.

[32]

Q. And is that your—I'm sorry. When I say "your," is that Abercrombie's business strategy?

A. Yes. Our in-store experience is a core driver of our business.

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[55]

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Q. As far as Exhibit No. 19 and the training before it changed in February of 2009, if an issue was raised regarding a religious accommodation, then the training was to contact the H.R. line; is that correct?

A. That would be correct.

Q. And is there any—prior to 2009, was there any training on how to determine whether an [56] issue was a religious discrimination issue?

A. If someone asked for any kind of accommodation, managers know to call H.R.

Q. Okay. If an employee doesn't ask for a religious accommodation, but there may be religious issues, how would the manager know to call H.R.?

MR. KNUEVE: I'll object, but you can answer.

THE WITNESS: Outside of a general running of the store, if there are any employees issues that come forth, the store managers in any of our 1,100 stores know to call the H.R. team.

BY MR. LEE:

Q. And tell me that—all the H.R. training—well, let me back up.

From Exhibit No. 19, is there a specific page that deals with the training on when to call the H.R. line?

A. We've always used the language and not specific to this exhibit, but in all of our training, if you have any doubt about anything, you call H.R. It's pretty common practice. We don't train our managers to be H.R. experts. That's what they pay my team to do.

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[62]

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Q. —when a scenario is given as to No. 4, what is your response? Or what is your training that you provide to the managers?

A. Our managers are aware that if someone is wearing a headscarf, The Look Policy specifically states that we do not allow headwear, and if that question were asked, you go back to page 36. It says, "This would be an exception. Call H.R."

Q. And if the applicant doesn't ask a question of the manager, what's the manager supposed [63] to do?

A. We ask them never to assume anything about anyone, so they do nothing.

Q. And is the interviewing manager supposed to take the headscarf into consideration when they are evaluating on whether or not to make a recommendation for hire?

MR. KNUEVE: I will object, but you can answer.

THE WITNESS: Our interviewing manager takes into consideration whether or not the individual has the appearance and style that we require from our

associates. So if the headscarf is outside of our style, that manager would need to take that into consideration as they would if the person had very visible tattoos or was heavily made up.

BY MR. LEE:

Q. And as to the applicants during the interview process, do you expect the applicants to be in compliance with The Look Policy at the time of the interview?

A. Applicants do not have to be in compliance at the time of the interview. However, most of our applicants, as I indicated, if we have between 200 or [64] 150 from this year, you go back a couple years to 250,000 employees, most of our applicants come to us because they know us. They shop with us. They have friends who work with us. So when they do come in, they're already aware of our policies and requirements for work.

They may not come in with Look Policy, but they are asked in the interview or we read the short paragraph that talks about our Look Policy, and they are asked whether or not they would be in compliance with that policy.

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[77]

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Q. And it's my understanding that The Look Policy is that—or the business strategy behind The Look Policy is that the models are to wear the clothing in order to get others people to buy the clothing like they

are wearing. Is that a simplified version of The Look Policy.

A. I would say that the models are supposed to model our style. They don't have to wear our clothing, but they have to model our style because it is part of that in-store experience that keeps our customers coming back. Yes.

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[92]

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Q. Okay. And as we sit here today, Abercrombie has allowed some exceptions to the wearing of headwear by models; is that correct?

A. That is correct.

Q. And as to a hijabs, do you know about how many models have been allowed an exception to The Look Policy?

A. I think for hijabs, probably around eight.

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[109]

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Q. I wanted to go into, if we could, if an accommodation request has been made, I think you've testified earlier that a manager is supposed to send it up to H.R.; is that correct?

A. Yes.

Q. What's the process once an H.R. person receives a telephone request for religious accommodation?

A. After the H.R. individual or H.R. professional receives a request, they look through the policy to see if there is the ability to accommodate the individual without undue burden; i.e., taking us off brand. If there is a way to accommodate the individual, they will make recommendations. This is then communicated back to the store manager, and as I indicated earlier, or the store manager's boss, and, then, it's communicated to [110] the associate.

Q. Okay. Give me the chain again. So the H.R. person that took the phone call first looks to wouldn't you say the ability to accommodate it? Is that H.R. person looking to a particular document?

A. They look to the policy. They look at different scenarios that may work. So, for example, if we get a request for religious accommodation for jewelry, which is usually a bracelet, the H.R. person takes a look at whether or not, in the spirit of The Look Policy, we are able to accommodate the individual without taking us off style, and may make the recommendation or several recommendations; i.e., if the individual wears a long-sleeve shirt, they can cover the bracelet, or if the individual is able to pin the bracelet inside of their clothing. We try to find some way to make the accommodation, make the recommendations, which are then communicated back through the management chain and to the associate.

* * * * *

[130]

Q. And do you believe allowing these exceptions would have a negative impact on Abercrombie?

A. As the H.R. leader? As Deon Riley?

MR. KNUEVE: I'll object.

BY MR LEE:

Q. Yeah. As the H.R. director.

A. As I stated before, the company's built on brand, our sense of style, and the in-store experience is paramount. Yes, I believe exceptions will take away from who we are as a brand.

Q. And how will they do that?

A. Customers come in for a consistent experience. We have a customer range of 12 to 17 to 23 years old, depending on the brand we have. It's a lot of competition. Teenagers and young adults are very fickle. Abercrombie has made a name because of the brand. It's a fact that you walk into an environment, and it's not just the smell or the sound, it's the way the merchandise is set up. It's the lighting. Most of all, it's the stylish clothing and the sense of style that each individual you interact with has. That's why people shop us. We sell jeans and T-shirts. So does Wal-Mart.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANT

Jan. 19, 2011

DEPOSITION OF HEATHER COOKE

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[23]

* * * * *

Q. Okay.

Let's talk about the time period when you were an assistant manager at the Abercrombie Kids store in Tulsa.

And as I understand it, that was from approximately December of 2007 until February of 2009; correct?

A. Yes.

Q. Okay.

What were your job duties as assistant manager at that time in that store?

A. I was in charge of hiring new employees, managing, supervising the floor. I did audits for the store, like to make sure all the clothing was out on the floor. I did some visual stuff.

Q. Okay.

And who was—who was your store manager at that time?

A. Andrew Sturm-Hamilton was his name.

* * * * *

[26]

* * * * *

Q. And who did you report to directly?

A. Andrew Sturm-Hamilton, and then Randall Johnson was my district manager.

Q. Was Randall Johnson actually located in your store?

A. No.

Q. Do you know where his office was or his primary location was?

A. I believe he was in Texas.

Q. Okay.

Did you ever see him in your store?

A. Oh, yeah, all the time.

Q. About how often would he come to the store?

A. Usually once a week.

Q. Would he spend the whole day there?

A. Yes.

Q. And what interaction did you have with him, generally, when he would be in the store?

[27]

A. He would just kind of go over what, you know, the visual displays, staffing goals, just like where the store needed to be.

Stuff like that.

Q. And was he your district manager the whole time you were the assistant manager there?

A. Yes.

Q. Okay. Now, you mentioned—strike that.

Did you supervise anyone?

A. Besides the associates like the models, no.

Q. But you did supervise the models?

A. Yes.

Q. All right.

Now, you mentioned that one of your duties as assistant manager was—I think you said you were in charge of hiring?

A. Yeah.

Q. Can you tell me generally what your duties were with respect to hiring?

A. I would do interviews. I would go recruiting around the mall or colleges or coffee shops.

And just stuff like that. Make sure our staffing goals were good. I did the schedule. I [28] scheduled the associates. Worked around their schedules at school or whatever work or whatever they had going on.

Q. Okay.

Now, you said that you did the interviews for—would that be for models?

A. Yes.

Q. Okay.

Did you make the decisions on—the final decision on whether an applicant for a model position would be hired?

A. Yes.

Q. Okay.

Did you make the decisions on—the final decision on whether an applicant for a model position would be hired?

A. If I had a question about something, I was to ask my store manager. And then if he didn't know, ask my district manager.

Q. When you say a question about something, what do you mean?

A. Like if I wasn't sure if this person had enough experience or we have a certain look policy that we—Abercrombie has, I would just ask.

Q. Okay.

Did you have the authority, as assistant manager, to decide to make an offer to an applicant after you had interviewed him or her?

A. Yeah. I mean—yes.

Q. Did you have to get an okay from either [29] **your store manager or your district manager?**

A. You usually had to get the store manager to like, you know, look over the interview guide or sit in on the interview sometimes, like if you didn't have anything like a meeting or something really important to do.

Q. Uh-huh. You say "you usually had to," I mean, was it your understanding that you could decide to hire somebody after the interview?

A. It was my understanding, but if I had any questions or anything like that, I wasn't sure if someone didn't have enough work experience or they—you know, just something about their look or the look policy, they were violating the look policy, I was to ask.

* * * * *

[35]

* * * * *

Q. Now, you said that you were responsible for interviewing and hiring models for the Abercrombie Kids store; correct?

A. Yes.

Q. And did you ever see a job description for a model?

A. Yes.

Q. Heather, I'm going to hand you what's been marked as Exhibit 1.

(Plaintiff's Exhibit No. 1 was marked for identification by the reporter and is included herewith.)

THE WITNESS: Okay.

Q. BY MS. SEELY: And ask you to just look [36] that over and let me know when you're done. See if you've ever seen it before.

A. (Witness complies.)

Yes. I've seen this before.

Q. Can you tell me what this is?

A. This looks like a job description for a model.

Q. Okay.

For a model for Abercrombie & Fitch?

A. Yes.

Q. And is this the job description for a model position at the Abercrombie Kids store when you were there?

A. Yes.

Q. Under what circumstances did you see this particular job description?

A. It was in the handbook, I believe.

Q. Okay.

If you would look, please, at the bottom of page 1 of Exhibit 1, where it says presentation—strike that.

Go back a little bit.

It says "tasks." Do you see that?

A. Yes.

Q. At the bottom third.

[37]

And then underneath it, it says: "The following list summarizes the tasks of the model position."

And under "presentation," the job description says: "Maintains visual and presentation standards throughout the store. Cleans, organizes and maintains the store."

Can you tell me what the model did in that regard?

A. Models were—they would fold the clothing. That's what it means by maintain visual presentations.

Q. Okay.

A. Cleaning the store, like they would have a broom and a mop thing, and they would mop the floor in the morning before we were open. And maintaining store is just folding again.

And we had certain zones. Like the first room was like girls one mand then the next room was like boys one, and so on. And they had to stay in those spots.

Q. They would be assigned to a particular zone?

A. Yes. They would be assigned—yes, like go to girls one. And Hollister was Betty's one, or * * *

* * * * *

[42]

* * * on their first day, or anything like that.

Q. Okay.

A. So that's—they would train a new model.

Q. Okay.

And the next task on the job description says "customer experience." And it says something to the effect "greets, thanks, interacts with and assists customers."

A. Uh-huh, yes.

Q. And what duties did the model have in that area?

A. We had something called kind tag lines; so when they would enter the store, you would say like "hey, what's up?" If somebody needed a size, a customer, you would get a size for them.

Just talking to customers, making sure they're finding everything okay.

Q. Okay.

And then finally, the task—the next task written in Exhibit 1 says: "Loss prevention and shrink."

What duties did a model have in that area?

A. Like if they saw somebody stealing a flip-flop, they could come up to them and be like, "Hey, I can hold that flip-flop at the register," [43] and they would come and get me, the manager.

Q. Okay.

So am I correct, then, that the models' duties that are outlined in Exhibit 1 were to clean and organize and maintain the store?

A. Yes.

Q. And also to respect and value the diversity of others?

A. Yes.

Q. And also to operate the cash register?

A. Yes.

Q. And open and close the store?

A. Yes.

Q. To train new models?

A. Yes.

Q. Also to help customers when they come in the store to find sizes?

A. Yes.

Q. And great them?

A. Yes.

Q. And also to be sure that there's no shoplifting?

A. Yes.

Q. Okay.

So is it correct that the model at the [44] Abercrombie Kids store where you worked did more than just stand around and model the clothes?

A. Yes.

Q. Now, looking on page 1 of the model job description, under entry requirements—

A. Uh-huh,

Q. —the exhibit indicates that there was no education—no minimum education that a model had to have; is that correct?

A. Yes.

Q. So they didn't have to have graduated from high school?

A. No.

Q. All right.

The next entry requirement listed on page 1 of Exhibit 1 says "specialty retail experience," and under that it says "none is required."

A. That's correct.

Q. Was it your understanding that a model applicant didn't have to have had previous retail experience in order to be hired?

A. Yes.

Q. Now, did—in your opinion, with respect to your hiring duties, did you find previous retail experience to be helpful?

[45]

A. Yes, a plus.

Q. And is that something that you liked to see?

A. Yes.

Q. And you considered in making a hiring decision?

A. Yes.

Q. Okay.

And when you hired models, did you—strike that.

So while having previous retail experience is not an entry requirement, according to the model job description, you thought it was a plus; correct?

A. Yes.

Q. Okay.

And you did consider it when you were making hiring decisions?

A. Yes.

Q. And we talked about Limited 2, remember?

A. Yes.

Q. And if an applicant for a model position had previous experience as a sales representative at Limited 2, did you think that was a plus?

A. Yes.

* * * * *

[60]

* * * * *

Q. Okay.

Now, when you had the—when you had conducted the group interviews, did you have a guide or a document that you worked from?

A. Yes. There was like a model group interview guidebook that you were supposed to use.

Q. And did you use that when you did interviews?

A. Yes.

* * * * *

[78]

Q. At the top it says, "section 4, closing the interview."

A. Uh-huh.

Q. Does this contain the information about ending the interview?

A. Yes.

Q. Okay.

And there's a big block on the page and it says:

"Closing statement (read to candidate)"?

A. Yes.

Q. Did you always read everything in this block or this closing statement at your group interviews?

A. Yes.

Q. There is a section in the closing statement that says "look policy."

Do you see that?

A. Yes.

Q. And do you remember did you always read that entire section on the look policy during your group interview?

A. Yes.

Q. You did?

A. Yes.

[79]

Q. Okay.

Now, is there anything written in the look policy section, on page 21 of Exhibit 4, that says anything about head coverings?

A. I do not see anything.

Q. Okay.

And is there anything in the section entitled "look policy," on page 21 of Exhibit 4, that says anything about not being able to wear the color black if you work at Abercrombie?

A. I don't see it, no.

Q. Okay.

So the section on the look policy that you read during your closing statements in your group interviews

did not say that models cannot wear anything on their head; correct?

A. Correct.

Q. And it did not say that models could not wear black; correct?

A. Correct.

Q. Okay.

Now, if would you look over on page 22 of Exhibit 4.

A. (Witness complies.)

Q. At the top, it says "Section 5 Interview [80] Evaluation Standards."

A. Yes.

Q. Can you tell me what this page—what's on this page? I mean, what did you use this page for?

A. We just used this like a grading scale on how they answer, you know. I just used this as my grading scale.

Q. So in other words, for outgoing and promotes diversity, the section at the top of the page—

A. Yes.

Q. —this section tells you, based upon your evaluation of the—or strike that.

Based upon your observations of the applicant, you would assign them either a 3, a 2, or a 1 in this competency, outgoing and promotes diversity?

A. Yes.

Q. And then you would do the same for the competency, sophistication and aspiration?

A. Yes.

Q. Okay.

And on the next page, page 23 of Exhibit 4, would you also assign either a 1, 2 or 3 [81] to the applicant on appearance and sense of style competency?

A. Yes.

Q. And the next page of Exhibit 4, page 24.

A. Yes.

Q. What is this interview—this says "interview rating sheet." Can you tell me what you used this for.

A. Whatever you scored them, you would put—you'd put the candidate's name. And then you would put your score.

And then would you tally it up. And then it would tell you down here on the little score if you were going to—if they meet recommendations or below recommendations, not recommended.

Q. Okay.

A. Or highly recommended.

Q. So you would—on the left-hand column, you would write—under candidate name, you would put their name?

A. Yes.

Q. And then you would give them either a 1, 2 or 3 in the three competencies—

A. Yes.

Q. —that are listed there?

* * * * *

[86]

* * * the store and kind of orientate them, what the store was like and where they would be at and all their duties and stuff.

Q. And did you hold orientations like every Sunday or just when you were hiring new people?

A. Usually every Sunday. We usually had somebody show up every Sunday.

Q. During the interviews that you conducted did you sometimes discuss the orientation with the applicants?

A. I think I might have mentioned like you might—if you get hired, you'll have to come in for an orientation.

But not—usually not, no.

Q. Okay.

A. I might have mentioned it.

Q. Okay.

Now, do you know Samantha Elauf?

A. I do, yes.

Q. How do you know her?

A. Her friend, Farisa, worked at the store. And it was approaching our tax-free weekend, where you don't pay tax on any clothing.

And so we were going to be really, really busy. And our staffing goals went up quite a bit, [87] and I needed a lot of employees very fast.

Q. Okay.

And what did Farisa have to do with Samantha?

A. I think she's best friends with her. And she has approached me and said, "I have a friend Sam who wants to come to an interview. What days should she come?" And I told her to come. I told her she needed to fill out an application, go upstairs and fill it out and

Q. Had you ever met Samantha before—I mean, did you know who Samantha was at the time that Farisa spoke to you about her?

A. I—she had worked in the mall, I think at like a little fondue place, and I had seen her. And I knew she was friends with Farisa because Farisa worked quite often.

So I knew who she was.

Q. Uh-huh.

A. I think I had seen her before.

Q. Had you seen her—she worked at Limited 2.

Had you seen her there at all?

A. I didn't see her. I mean, my sister did work there, but I—I went in there a lot, but I [88] didn't see her.

Q. Okay.

But you had seen her at the mall before?

A. I had seen her, uh-huh, at the fruit fondu place.

Q. Had you seen her once or more than once?

A. I would say more than once.

Q. And when you saw her, was she wearing a head scarf?

A. Yes.

Q. Did you have any opinion when you saw her in the mall as to her appearance?

A. I thought she was very pretty.

Q. So when Farisa spoke to you, did you remember who she was?

A. Yeah, uh-huh.

Q. Okay.

Did Farisa say anything to you at that time about Samantha wearing a head scarf?

A. No.

Q. But you knew that she did?

A. I did, yes.

Q. And you assumed if she worked at Abercrombie, she would still be wearing that?

A. Yes, I did.

[89]

Q. Okay.

And you told Farisa have her go and fill out an application on the kiosk?

A. Yes.

Q. So what is the next thing that happened with respect to—strike that.

Do you know if Samantha filled out an application on the kiosk?

A. Yes, I do.

Q. How do you know that?

A. From this piece of paper, the application form. This is what she filled out.

Q. Okay.

So you are pointing to what has been marked as Exhibit 2.

A. Oh, Exhibit 2. Sorry.

Q. Okay.

A. Yes.

Q. And you looked—did you see that Exhibit 2 on the computer in your Abercrombie Kids store?

A. Yes.

Q. And do you remember if you reviewed it before you interviewed Ms. Elauf?

A. I honestly do not remember if I reviewed [90] it. We were extremely busy; so I don't remember if I reviewed it.

Q. Okay.

And you said you were approaching the tax-free weekend at the time.

Was that in the summer?

A. Yes, August.

Q. August or was it June or July?

A. Maybe—I thought it was in August, but maybe it was July.

Q. Sometime in the summer?

A. Summertime.

Q. Okay.

A. Well, the kids weren't back at school.

Q. All right.

Now, did you talk to anyone other than Farisa about Samantha working at Abercrombie before you interviewed her?

A. No.

Q. Okay.

And did you interview Samantha Elauf for a job as a model?

A. Yes, I did.

Q. Okay.

A. Can I—the question before that you [91] asked if I told anybody.

I'm pretty sure that I—we had recruiting goals for the day. And I'm pretty sure I put her name on like my recruiting goal that like somebody was coming for an interview.

So I could have told the store manager, "Hey, I have Samantha. She's coming to interview," so he could tell the district manager.

So yes, I might have told somebody she was coming for an interview. That's it.

Q. Okay.

Do you remember having any specific conversation with your store manager about Samantha coming for the interview before the interview happened?

A. Like I said, I think I just told him like, "Samantha is coming. She's Farisa's friend. She's going to come do an interview on Tuesday," da da da date.

Q. And this was Andrew?

A. This was the store manager, yeah.

Q. And do you remember what, if anything, he said when you told him that Samantha was coming for an interview?

A. He said, "Good. Good job." You know, [92] "You got a recruit for the day. Good job."

Q. Do you know, at that time, if Andrew knew who she was?

A. I do not believe Andrew knew who she was, no.

Q. And why do you say that?

A. He wasn't very sociable; so I don't know if he walked around the mall like—and that's how I saw her.

I would go down to the food court, and I would see her.

Q. Yes.

A. And I don't know if he really paid attention to who is friends with who or anything like that.

Q. Okay.

A. So.

Q. Do you ever remember seeing Samantha coming into the Abercrombie Kids store before you interviewed her?

A. I believe that she was probably in there to see Farisa or to poke in—I don't know if I saw her shopping in there, but I think I had seen her say "hello" to Farisa at the door or something.

Q. Okay.

[93]

A. You know.

Q. All right.

So what happened next after you reviewed Samantha's application on the computer?

A. She came in for an interview, after that. She just came in, and I interviewed her.

Q. Do you remember if she was—well, how much time passed between just—

THE WITNESS: A couple days—

A. —I'm not really sure.

Q. Okay.

And was she the only person you interviewed at that time? Or were there other applicants in the group interview?

A. I believe there were other people, but I'm not sure.

Q. Okay.

And did you have a Model Group Interview Guide with you at that time?

A. Yes, I did.

Q. That you filled out?

A. Yes.

Q. All right.

MS. SEELY: Let's go off the record for a [94] second. Let's take a quick second. I need to restaple these.

Do you need to use the restroom.

THE WITNESS: Yes.

THE VIDEOGRAPHER: 11:27 A.M. This concludes videotape No. 1.

(A recess was taken.)

THE VIDEOGRAPHER: All right.

It's now 11:34 A.M. Beginning of videotape No. 2. We're back on the record.

Q. BY MS. SEELY: Okay.

Heather I'm going to give you what's been marked Exhibit 5.

(Plaintiff's Exhibit No. 5 was marked for Identification by the reporter and is included herewith.)

THE WITNESS: Okay.

Q. BY MS. SEELY: And ask you to take a look through that. And let me know when you're done.

A. (Witness complies.)

Okay.

Q. What is that document?

A. It is the group interview with Samantha.

Q. So is this the Model Group Interview Guide that you filled out for Samantha Elauf?

[95]

A. Yes.

Q. And looking at page 2 of Exhibit 5, which is A&F 8—

A. Yes.

Q. —does that refresh your recollection as to whether Samantha was the only applicant you interviewed at that time?

A. Yes, she was.

* * * * *

I'm going to show you what's been marked as Exhibits 6 and 7.

(Plaintiff's Exhibit No. 6 and 7 were marked for identification by the reporter and are included herewith.)

Q. BY MS. SEELY: Heather, are Exhibits 6 and 7 photographs of Samantha Elauf?

A. Yes

Q. Okay.

So you remember what she looked like?

A. Oh, yeah.

Q. And in Exhibits 6 and 7, she's wearing a head scarf; is that right?

A. Yes, she is.

[96]

Q. And do you recall if this was the type of head scarf she was wearing when you interviewed her?

A. Yes, I think it was.

Q. Okay.

Now, when you—you said, you had seen her around the mall before you interviewed her; correct?

A. Yes.

Q. And she was wearing a head scarf at that time?

A. Yes.

Q. And what did her wearing a head scarf signify to you, if anything?

A. That she was Muslim. I figured that was the religious reason why she wore her head scarf, she was Muslim.

Q. Okay.

Back to Exhibit 5, the Model Group Interview Guide—

A. Yes.

Q. —that you filled out on Samantha.

Page 2, Abercrombie & Fitch 8, is that Samantha's handwriting, to your knowledge?

A. Yes, it is.

Q. That's not your handwriting?

A. No, it's not.

[97]

Q. And she filled it out because that was your practice to have the applicant fill it out?

A. Yes.

Q. Okay.

And you were the interviewer who filled out this guide; correct?

A. Yes, I was.

Q. And at the time Samantha came for the interview, you assumed she was Muslim; correct?

A. Yes, I assumed.

Q. Because she wore the head scarf?

A. Yes.

Q. All right.

Now, do you remember anything in particular that you discussed with Samantha during your interview, other than the questions that are on the Model Group Interview Guide?

A. I think—I know I mentioned like that this was going to be a really busy time, and the tax-free was coming, and that I needed as many people.

And you know, that it was going to be really hectic, and you, know that three days that we had tax-free was just going to be really hectic.

And you know, I explained to her like what [98] I assumed was going to happen because I had never been through one. But I think I talked to her about that that, you know, it was going to be really busy.

Q. And you asked her the questions that are contained on the Model Group Interview Guide; is that right?

A. Yes, yes.

Q. And do you remember anything else that you discussed with her during the interview?

A. I think—no. Not anything—I mean, out of this, I don't think anything else I talked to her about.

Q. Okay.

Did you discuss the fact that she wore a head scarf during the interview?

A. No, no.

Q. And do you remember if the head scarf she was wearing at the time was black or some other color?

A. I think it was black.

Q. Did you discuss with her the fact that she could not wear black if she was hired as a model?

A. No.

Q. You remember that clearly?

A. I don't think I mentioned—unless—[99] it's not in here; so I did not say it.

Q. Okay.

Now, when you were interviewing Samantha, did you personally see that there would be any problem—strike that.

When you were interviewing Samaritan, did you believe that there would be any problem with her working as a model at Abercrombie Kids wearing a head scarf?

A. I had never interviewed anybody that wore a head scarf; so I thought I'd ask like the store manager because I've asked him questions about stuff like anything—tattoos or any piercings.

I thought I would ask him and see what he thought. And—but other than that, no. I mean.

Q. Well, I guess my question is: During the interview, you saw she was wearing the head scarf?

A. Yes.

Q. Did you, at that time, feel that she should not be able to work as a model at Abercrombie Kids because she was wearing the head scarf?

A. No. I did not feel. I felt like she could. I didn't feel like there was anything wrong with it.

[100]

But I knew that in—not in this, but in the Employee Handbook, it does say that we're not supposed to wear the color back. But they had just said we could wear black converse tennis shoes. So I was a little unclear.

And I think it says in the handbook you can't wear hats. So I was unclear. So that's why—I was the assistant manager and that's why I asked the store manager and the district manager.

Q. Why didn't you say to Samantha, you know, the look policy requires no—you know, "You can't wear anything on your head."

Why didn't you bring that up with her if you knew the handbook says that was against the look policy?

A. Because it was in the handbook and it wasn't in this. I was told just to follow this.

Q. By "this," you mean the Model Group Interview Guide?

A. Yes, the group interview.

Q. So you were sticking to the script?

A. I was just sticking to the script. That's what most people do; so that's what my store manager did.

Q. Okay.

[101]

A. She showed me; so I just did it like I normally would.

Q. Okay. All right.

And on Exhibit 5, Samantha's Model Group Interview Guide on page—the third page—not the third page. Sorry.

Do you remember reading the opening script, as you sit here today, to Samantha?

A. Yes.

Q. Okay.

And then on the page after that—and it says at the bottom A&F 1996.

A. Yes.

Q. Is that your handwriting under "outgoing and promotes diversity" under the group A questions and the group B questions?

A. Yes. It looks like it.

Q. So did you write, basically, a summary of Samantha's answers to your questions on page 1996?

A. Yes.

Q. Okay.

And under the—when you asked her the question "what is your definition of diversity," do you think she gave a good answer?

A. Yes. It looks like she said something [102] about different types of people from different backgrounds. Just different people.

Q. Okay.

Now, I see that under the column headed appearance and sense of style, it's blank.

Did you—do you recall writing anything in that column when you did the interview?

A. Like I said, when I originally—my store manager—I went through a group interview with her, there wasn't this column.

So I really wasn't sure what this column was. So for a long time I don't think I wrote anything in it.

And I think maybe a district manager or a store manager like told me, "Heather, you need to start writing in the appearances and sense of style," because I just wasn't aware that I was supposed to write it in there.

Q. Okay.

So you think—as you sit here today, you think you just never wrote anything in that column for Samantha?

A. I believe that I did not write anything in that column.

Q. You don't remember writing anything?

[103]

A. I don't remember writing anything.

Q. Did anyone tell you to go back and white-out any writing that you might have put in that column?

A. I don't recall anyone telling me to white-out anything.

Q. Okay.

If you would look at the next page of Exhibit 5, and that's numbered A&F 2681.

A. (Witness complies.)

Uh-huh.

Q. Is that your handwriting on this page?

A. Yes. It looks like it.

Q. And did you summarize, in your handwriting, her answers to the questions you asked her?

A. Yes.

Q. Okay.

And if you could look over at the last page of Exhibit 5, which is A&F 1997.

A. (Witness complies.)

Yes.

Q. Okay.

Is that your handwriting on this interview rating sheet?

[104]

A. Yes.

Q. And is this the interview rating sheet that you filled out for Samantha Elauf after your interview was over?

A. I do not believe this is the actual one that I filled out.

I believe this is one that I printed out later on and was told what to score her.

Q. Okay. Well, let's talk about that.

So at the conclusion of your interview with Samantha, am I correct that you filled out an interview rating sheet?

A. Yes.

Q. Okay.

And do you recall, under the column "outgoing and promotes diversity," there's a number 2 written there?

A. Yes.

Q. Do you recall if that was the score you originally gave her?

A. Yes, I believe it is.

Q. Okay.

And under the column headed "sophistication and aspiration," there's a 2 written in that column; is that correct?

[105]

A. Yes.

Q. Is that the score you originally gave her?

A. Yes, I believe so.

Q. And under the column headed "appearance and sense of style," there's a number 1 written there; correct?

A. Yes.

Q. Is that the number—or the rating that you gave her originally?

A. I think I gave her a 2.

Q. Okay.

A. But I'm not sure, but I think, I gave her a 2.

Q. Did you give her a 1 originally?

A. No.

Q. Okay.

Might you have given her a 3?

A. No. I'm pretty sure—somebody had to be really, really good as a 3. I mean, I hardly ever gave 3's.

Q. Uh-huh.

A. I'm pretty sure on most of them, I gave them 2.

Q. Okay.

A. That seems to be the medium.

[106]

Q. But you know as you sit here today, that you did not give her a 1 originally?

A. I do not believe I gave her a 1 on my own.

Q. Okay.

And then there's a total score written 5; is that correct?

A. Yes.

Q. Okay.

Now, if you had given her a 2 under appearance and sense of style, is it fair to say that the total score that you originally gave her was a 6?

A. 6, yes.

Q. Is that correct?

A. Yes.

Q. Okay.

And then under "hiring recommendation," there's an X in the column headed not recommended.

A. Yes.

Q. Is that right?

A. Yes.

Q. Was that your original recommendation?

A. No. It was recommended was my original.

Q. Okay.

And so after you filled out your original [107] interview rating sheet, what happened next in terms of the decision on whether or not to hire Samantha Elauf?

A. I was unsure about the head scarf; so I asked the store manager. And he did not know anything about it.

And so I asked the district manager and—Randall Johnson, and he told me not to hire her because she had a head scarf.

And that we were not allowed to wear hats at work. And if she wore the head scarf, then other associates would think they could wear hats at work.

Q. Okay.

And did you—did you discuss it with him in sort of—did you have any discussion with him over this?

A. Yes, I did. I thought she was a very good candidate to work there.

And I asked him, you know, she wears the head scarf for religious reasons, I believe. And he said, "You still can't hire her because someone can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them."

And I told him that I believed that she [108] was Muslim, and that was a recognized religion. And that she was wearing it for religious reasons. And I believe that we should hire her.

Q. And what did he say?

A. He told me not to hire her.

Q. Okay.

And I take it you specifically—you remember that he said someone could paint themselves green and claim it was a religion?

A. Yes.

Q. That stuck in your head?

A. It did, yes.

Q. Okay.

A. Very much.

Q. Now, did he make any—and this is Randall Johnson we're talking about; correct?

A. Yes.

Q. Your district manager?

A. Uh-huh, yes.

Q. Had he ever seen Samantha, to your knowledge?

A. I do not believe he had. I don't know if he had. He might have, but I'm not—I don't believe that he had.

Q. Okay.

[109]

Did you tell him, during this discussion, anything about her appearance, your view of her appearance?

A. Uh-huh. I told him that she wore a black head scarf and that she was very pretty. From what I recall, I remember that she did have like a Abercrombie & Fitch like T-shirt on. I think a pair of jeans.

And I thought she would be a really good candidate to work there. And I told him that that I thought we should hire her.

Q. Do you remember if he made any remarks, any disparaging remarks, about her head scarf?

A. No.

MR. CLARK: Objection.

Q. BY MS. SEELY: Do you recall whether he said something to the effect of "she can't work here wearing that thing on her head"?

A. I don't recall him saying that to me. I don't recall that.

Q. Did you ever hear that he said that to anyone else?

A. I didn't hear that.

Q. No other manager said, "Oh, Randall told me she can't wear that thing on her head"?

[110]

A. Not that I recall.

Q. So after Randall Johnson told you you could not hire Samantha, what happened next?

A. Nothing. I only called candidates that I was going to hire. I told them at the end of the interview, "Kind of treat this as a casting call. We'll call you, don't call us."

And I just never had any contact with her. So nothing.

Q. About hiring her?

A. About hiring her.

Q. Okay.

Now, at some point in time, did Farisa talk to you about whether or not Samantha was to be hired?

A. Yes.

Q. And when did that occur, relative to the interview?

A. A couple days—a week later, she asked like, "Are you going to hire my friend?"

And I told her, no, I was not going to.

Q. And did you tell her why?

A. I told her I couldn't discuss anything in the interview, but I just was not going to hire her.

Q. Did you tell Farisa that it had anything [111] **to do with the fact that she was wearing a head scarf?**

A. No.

Q. Did Farisa ask you if it had to do with her wearing a head scarf?

A. Yes.

Q. What, as best you can recall, did Farisa say to you?

A. She said, "Is it something—why aren't you going to hire her? She's really good. She is my best friend." And she seemed very upset.

I said, "I can't hire her and I can't talk to you about anything that goes on in the interview, questions, anything like that. I'm just not going to hire her."

Q. Did Farisa mention her head scarf, Samantha's head scarf?

A. Yeah.

Q. What did she say about it?

A. She said, "Are you not going to hire her because of her head scarf?"

And I said, "No. I was just told I couldn't hire her because of the heard scarf."

I did tell her that.

Q. So you told Farisa you could not—you [112] **were told you couldn't hire her because of the head scarf.**

A. And I said, "I really can't discuss this anymore because I don't want to get in trouble or fired or lose my job over something like this, and I really can't talk to you anymore about that."

Q. Now, when you told Farisa that you couldn't say anything more because you didn't want to get in trouble or get fired, why did you say that?

A. I had a feeling this was going to be a problem. I wanted to hire her. I thought that she would be a good candidate to come work for us.

I had a feeling this was going to be a problem, like I thought this was wrong. I didn't like it. And

that's why I figured that there was going to be a problem.

* * * * *

[121]

* * * * *

Q. Okay.

Now, you said that you—said a couple times that you thought Samantha was a good candidate to work at Abercrombie as a model; correct?

A. Yes.

Q. Why did you think that? What was it about her that made you think that?

A. She was excited to—like she was excited about the company and the brand. She had retail experience.

She just seemed like a good person to work there. Like—we had a lot of problems with—we had tag lines up in the front room, and they had to say things within a certain amount of time. And some of them were embarrassed to talk to customers.

And I figured she was—you know, she was outgoing; so I figured that she would say the tag lines.

And I know we would get secret shopped. And if we had a bad secret shop, it was usually based on somebody didn't say the tag line.

And so I figured that I could put her up [122] there and she would say the tag line and she would help customers because she worked in retail.

So I figured that she would be really good.

Q. And how about her appearance? What did you think about that?

A. Like I said, I thought she was very pretty. She had an Abercrombie shirt on. I thought she would be a good candidate.

Q. Going back to Exhibit 5, the Model Group Interview Guide that you filled out for Samantha—

A. Yes.

Q. —you testified that you originally filled out an interview rating sheet that was different than the one that is on—in Exhibit 5; is that correct?

A. Yes.

Q. Okay.

So how is it—when did you fill out the interview rating sheet that is in Exhibit 5, which is numbered A&F 1997?

A. When my district manager, Randall Johnson, told me not to hire her, and he told me to give her a 1 on appearance, so then her score would be a 5 instead of a 6, and I would not hire her.

[123]

Q. So he gave you those instructions. And then you went and filled out a new interview rating sheet?

A. Yes.

Q. And that's the interview rating sheet that's in front of us now?

A. Yes.

Q. Which is A&F 1997?

A. Yes.

Q. What happened to the original interview rating sheet that you filled out?

A. It was thrown away.

Q. Did you throw it away?

A. Yes.

Q. And why did you throw it away? Did someone tell you to do that?

A. Well, he told me to make sure that she was not hired; so I mean, I couldn't put it on the back of it. So I just threw it away.

Q. Okay.

A. He told me to write this so.

Q. Do you remember any other conversation that you haven't already told me about that you had with Randall Johnson about Samantha Elauf?

A. Ummm.

[124]

Q. Anything else he said to you or you said to him?

A. I can't think of anything else. I mean, I know he took me outside and told me to not say anything.

I can't recall any other times that we talked about it.

* * * * *

[125]

* * * * *

Now, I want to take you back to your interview with Samantha Elauf.

A. Yes.

Q. And I think you testified that she was wearing an Abercrombie & Fitch T-shirt when you interviewed her.

A. Yes.

* * * * *

Now, at the time you interviewed her, did you think she was attractive?

A. Yes. Very pretty.

[126]

Q. And did she appear to be an active person?

A. Yes.

Q. Did she appear to be outgoing?

A. Yes.

Q. Did you think she was stylish?

A. Yes.

Q. Did you think she appeared to be happy?

A. Yes.

Q. Did she appear to you to be a fun person?

A. Yes.

Q. Did she appear to you to be confident?

A. Yes.

Q. Would you call her pretty?

A. Yes.

Q. And did she appear to you to be a casual person?

A. Yes.

Q. And did she appear to you to be a diverse person?

A. Yes.

Q. Why did she appear diverse to you?

A. She—well, I mean, the head scarf was—she was a little bit like darker complected.

That's all I noticed that she was diverse.

Q. And she answered your question on what is [127] **diversity correctly, in your opinion?**

A. Yes, she did.

Q. Okay.

Are we on 8? I think we're on 8; right?

Heather, I'm going to hand you what's been marked Exhibit 8, and ask you to take a look at that and let me know if you can identify it.

(Plaintiff's Exhibit No. 8 was marked for identification by the reporter and is included herewith.)

THE WITNESS: (Witness complies.)

MR. CLARK: Take your time.

THE WITNESS: Okay.

MR. CLARK: Do you want her to read the whole thing?

MR. SEELY: No. I just want her to take a look at it—

THE WITNESS: No. I was just looking at something. It looks like this is the Employee Handbook.

Q. BY MS. SEELY: Okay.

Is Exhibit 8 the Employee Handbook that was in effect when you were the assistant manager at the Abercrombie Kids store in Tulsa?

A. I believe so.

[128]

Q. Okay.

Would you please look at page 29 of the—of Exhibit 8. The page number of the book is 29. It's also marked A&F 53.

A. (Witness complies.)

Okay.

Q. Do you see that?

A. Yes.

Q. And up towards the top, there is a heading that says "Appearance/Look Policy"?

A. Yes.

Q. Do you see that? Okay.

And about halfway down the page, it says A&F Look Policy Guidelines.

Do you see that?

A. Yes.

Q. Okay.

And it goes over onto the next page, page 30. And on page 30, there's actually the second paragraph says "caps"?

A. Uh-huh.

Q. Caps. And it reads:

"Caps. Even though Abercrombie & Fitch sells caps, they are considered too informal for the image we project. Caps are not [129] allowed to be worn on the sales floor."

Did I read that correctly?

A. Yes.

Q. Now, was it your understanding—well, strike that.

Did Abercrombie & Fitch sell baseball caps at the time you worked for them?

A. Yes, they did.

Q. Okay,

And was it your understanding that the male models couldn't wear baseball caps even though Abercrombie sold them?

A. Yes.

Q. Okay.

Now did you believe that the look policy prohibited anything on the head, when you were assistant manager there? Or did you think it just went to caps?

A. I assumed that it just meant caps; so I mean—I had never encountered anybody else that had anything else on their heads; so a cap was the only thing I ever encountered.

So I assumed caps.

* * * * *

[150]

* * * * *

Q. Based upon your observation of Samantha Elauf at the interview that you held with her and at other times, would you say that she could be described as flirtatious?

A. I don't believe that she was flirtatious, no.

Q. How about energetic?

A. Yes.

Q. Did you feel that she had an attitude in a good way?

A. Yes, I mean a positive attitude, yeah.

Q. Would you use the adjective popular in connection with her?

A. I could see that she could be a popular girl.

Q. How about wholesome? Did she seem wholesome to you?

A. Oh, yes.

Q. Thank you. I'm going to hand you what's [151] been marked as Exhibit 14. And I'm going to represent to you that this was a letter that was sent to the EEOC during the investigation Samantha charge of religious discrimination. And it was sent by an attorney for Abercrombie on November 12, 2008.

And I have no reason to believe you've ever seen this before.

(Plaintiff's Exhibit No. 14 was marked for identification by the reporter and is included herewith.)

THE WITNESS: Okay.

Q. BY MS. SEELY:

But I'm showing it to you now because I want to look at a couple of statements that were made in the letter to see if you agree with them.

A. Okay.

Q. If you would look at the third page of Exhibit 14, at the bottom, it says EEOC 85. At the very bottom of that page, the last sentence on that page reads:

> **"Assistant manager Heather Cooke conducted the interview and reviewed with Ms. Elauf certain Abercrombie policies including the look policy."**

And is that a true statement?

[152]

A. I think in the interview guide, there's a few—a small paragraph about the look policy; so it doesn't go

into detail. It just gives the general so they are aware that we have one.

I felt it was a little strict, but they know ahead of time.

Q. Okay.

So it is true, then, as you sit here today you recall going over some portions of the look policy?

A. Some portions of it, yes, of the look policy with her.

Q. And in the next paragraph, which is on page—the fourth page of Exhibit 14, at the bottom, it's numbered EEOC 86, the first full paragraph says, in the second sentence:

> **"Ms. Cooke decided that Ms. Elauf was not qualified for a model because both her head covering and the color of the covering violated the look policy."**

Is that a true statement?

A. No, I did not—no. I was told to not hire her by Randall Johnson, my district manager.

Q. So you did not decide that she was not qualified for the model position?

[153]

A. No, I did not.

Q. That was someone else's decision?

A. Randall Johnson.

Q. Okay.

Now, if you would look at the second full paragraph on EEOC 86, the paragraph starts out: "In her charge."

Do you see which one I'm talking about?

A. Yes.

Q. The third sentence says:

"Ms. Cooke did not know Ms. Elauf's national origin or religion at the time of the interview."

Is that a true statement?

A. I did not know. I mean, no, I did not mow.

Q. Did you assume that she was Muslim?

A. I did assume that she was Muslim.

Q. Did have any—did you make any assumptions about her national origin?

A. No. I just assumed that she was Muslim because of the head scarf was for religious reasons.

* * * * *

[163]

* * * * *

Were you also responsible for making sure that models were within compliance with the look policy?

A. Yes, I was.

Q. Was that a big part of your job?

A. Yes.

Q. How often would you say, in your time as an assistant manager at the Abercrombie Kids store, would you have a model come into work in some way [164] **deviating from the look policy?**

A. Quite often. We'd have to send them home to change if they weren't in the look policy.

Q. Okay.

So in some instances, they would be sent home?

A. Yes.

Q. And told them to come back in compliance?

A. Yes.

Q. And in other instances, they would be allowed to change what they were wearing?

A. Yes. Like if they weren't shaved, they would have to go in the bathroom and shave with the razor and shaving cream.

* * * * *

[168]

* * * * *

Q. And you had two concerns regarding that [169] **that you discussed with first your store manager and your district manager; correct?**

A. Yes.

Q. And those two concerns were that she had a head scarf and that the head scarf was black; correct?

A. Yes.

Q. And when you spoke to your district manager, Randall Johnson, you knew that head wear and black items were prohibited by the look policy; correct?

A. Yes.

* * * * *

Abercrombie & Fitch Job description for: model

model

projects and protects the image of the brand through personal style, providing customer service and maintaining presentation standards

entry requirements

the following list summarizes the entry requirements of the model position

education

- None

specialty retail experience

- None is required

supervisor/managerial experience

- None is required

work schedule requirements

Part-time associates are typically required to work one to two shifts per week on average, each shift being about 5 hours. Part-time associates are expected to be on-call at least one shift per week.

tasks

the following list summarizes the tasks of the model position

presentation
Maintains visual and presentation standards throughout the store. Cleans, organizes, and maintains store, ensuring assigned zones are standardized. Completes store recovery.

represents the brand
Creates a fun and engaging environment by upholding Abercrombie's vision and standards, and generating new ideas to improve store experience and entertain customers. Adheres to Abercrombie guidelines in personal appearance, and rules of conduct. Recruits and recommends candidates for store positions.

communication
Develops good working relationships with others. Keeps manager informed of customer, maintenance, and cleanliness issues. Communicates with others in a timely and appropriate manner. Respects and values the diversity of others.

policies and procedures
Follows Abercrombie procedures, including Handbook Policies, as well as all managerial instructions and assignments. Follows standard procedures for opening and closing the store. Arrives, clocks in, and clocks out promptly for shift. Operates cash register.

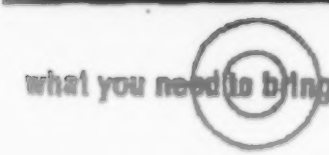
training/development
Participates as an active team member in accomplishing team goals. Seeks out, listens to, and uses feedback to improve job performance.

customer experience
Greets, thanks, interacts with, and assists customers to exceed their expectations and ensure they are satisfied with their Abercrombie experience. Keeps up to date on merchandise choices to share this knowledge with customers. Adheres to assigned zone coverage.

loss prevention and shrink
Follows all Abercrombie safety and security policies. Follows all fitting room procedures. Monitors shrink by being aware of signs of theft, communicating customer service recovery statements, and assisting loss prevention in the event of theft.

competencies

the following list summarizes the competencies of model position



Sophistication & Aspiration
Appearance and Sense of Style
Interpersonal Interaction
Diversity Awareness
Work Ethic
Integrity

Loss Prevention
Visual Displays
Product Knowledge
Fashion and Trend Knowledge
Adaptability/Flexibility

Applied Learning	Multi-Tasking
Outgoing	Proactive Thinking
Communication Skills	Attention to Detail
	Register Use
	Customer Focus
	Passion for the Brand

[IMAGE OMITTED] **Abercrombie & Fitch**

[redacted] **model group interview guide**

[IMAGE OMITTEED]

date: [6-26-08]

store: [239]

division: [kids]

interviewer name: [Heather Cooke]

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FOR MONTHY HR MAILING

March 2008

candidate sign-in sheet

As an interviewer, prior to administering this structured interview, you must:

- make sure all candidates sign in below
- collect the sign-in sheet before beginning the interview

Please Print Clearly!

	first name	last name	date/[Phone #]
1.	[Samantha]	[Elauf]	
2.	_____	_____	
3.	_____	_____	_____
4.	_____	_____	_____
5.	_____	_____	_____
6.	_____	_____	_____
7.	_____	_____	_____
8.	_____	_____	_____

section I: instructions to interviewers

As an interviewer, prior to administering this structured interview, you should:

- review competency descriptions:
  - **outgoing & promotes diversity:** The ability to be extroverted, fun, friendly, active, and social. This includes projecting an energetic, dynamic, vigorous and lively personality, actively seeking out interaction with others. This includes maintaining liveliness and enthusiasm, having a positive demeanor, displaying a passion and enjoyment for life, and focusing on success. This also includes the ability to work and relate well to people from diverse backgrounds; being aware of, understanding, respecting, valuing, being sensitive to, and promoting diversity (e.g., racial, cultural, ethnic, gender, sexual orientation, age, educational, professional, etc. backgrounds and styles of others) and adapting one's own behavior based on that understanding. This includes seeking out, valuing, and utilizing these individual difference to implement and realize Abercrombie's commitment to diversity and inclusion.
  - **sophistication & aspiration:** The ability to show confidence, poise, and maturity. This includes believing in oneself and one's own abilities, the ability to think positively about actions and events and anticipate the best possible outcomes, maintaining liveliness and enthusiasm, having a positive demeanor, displaying a passion and enjoyment for life, and focusing on success; influ-

encing customers' aspiration to dress in Abercrombie brand clothing.

- **appearance & sense of style:** The ability to present oneself attractively, appear well groomed, and wear attractive, stylish, fashionable clothes and hairstyle, make-up, and accessories that are consistent with the Abercrombie brand. This includes having personal attractiveness that exhibits personal appeal and wearing clothes that fit the brand and setting the example of the brand lifestyle.

- review interview questions and evaluation standards on the following pages
- review candidates' applications for past jobs and experiences related to the interview
- review minimum qualifications for the position
  - Education: none; Specialty Retail Experience: none; Supervisory/Managerial Experience: none

The interviewer should take detailed notes during the interview. Your notes should:

- be legible;
- record what was actually said;
- be specific and focus on behaviors;
- include relevant details;
- use descriptive and concrete terms;
- ensure that you have enough information about each candidate to rate him/her on each competency;
- not be concerned with correct spelling; and
- ***NOT BE REVEALED TO THE CANDIDATE.***

Upon completion of the interview, you should:

- review notes and highlight important behaviors;
- review the evaluation standards associated with each competency;
- compare candidates' behaviors to evaluation standards for each competency and assign a score (note: be sure to document your ratings in the appropriate column);
- record comments on candidates' overall strengths and weaknesses;
- add individual competency scores to determine the candidates' final scores;
- compare the candidates' final scores to hiring recommendation (e.g. Below Expectations, Meets Expectations, and Outstanding);
- record hiring recommendation in Application Management System; and
- ensure all interview materials are securely stored.

section II: outline for opening the interview

BEFORE YOU BEGIN THE INTERVIEW:

Part of your role as an interviewer includes the responsibility for helping candidates perform their best during the interview. You can help candidates feel comfortable by:

- ensuring a quiet, distraction-free environment;
- building rapport; and
- avoiding inappropriate questions during initial conversations

INTRODUCTION

1) Introduce yourself by giving your name and your position.

2) Welcome them to the interview and thank them for being interested in Abercrombie & Fitch.

3) Let applicants know that it is really important that everyone fill out an application on the kiosk before the interview. ASK: Has anyone NOT completed an application on the kiosk? If they have not, please tell them that they need to do so, and they should attend an interview on a later date, once their application is completed.

4) Let the applicants know that we use a structured interview and that you will be reading from a guide during the interview to make sure that you cover everything completely.

Opening Script: Read to candidates AFTER you've gone through the introduction (above)

Remember to read slowly, praise when effective, and maintain eye contact as much as possible

The purpose of the interview today is to help me get to know you a little better, and for you to learn a little more about Abercrombie & Fitch and this position.

Abercrombie & Fitch is committed to increasing and leveraging the diversity of our associates and management across the organization. We are promoting the diversity of our workforce through recruitment and by providing equal opportunities to all applicants and associates, regardless of race, ethnicity, or gender.

This is a model group interview, so I'd like to talk to you briefly about the model position. The model projects the image of the brand through personal style, providing customer service, and maintaining presentation standards. Hopefully you all had a chance to look at the job description of the model position, but let me give you a brief overview of what a model does in the store on a typical day. A model:

- represents the brand by creating a fun and engaging environment in the store;
- cleans, organizes, and maintains the presentation of the store;
- interacts with customers and answers their questions about the clothes;
- typically works one to two shifts per week, and each shift is about 5 hours, although schedules will vary throughout the year;

- is expected to be on-call at least one shift per week.

Does anyone have any questions for me about the Model position at this point?

During the interview, I will be asking questions to get specific information about your job related experiences. Everyone who interviews for a model job will be asked the same types of questions. It is totally fine for you to take some time and think about your answer before you respond. I will be taking notes on your responses to help me remember what you all said during the interview. You will have a chance to ask me questions at the end of the interview.

This interview will evaluate your fit solely for the Model position. However, we have many other store positions, and if you would like more specific information on these positions, please talk to me after this interview.

Introduction of Applicants:

Please introduce yourself by telling us your name, something you like to do for fun, and why you want to work for Abercrombie.

Additional Conversational Questions: (Optional)

- Who is your favorite band or group right now?
- If you could have any job in the world, what would it be?
- What makes a job fun for you?

section III: interview questions & notes

Choose 1 question from each group. Repeat the question to each candidate. Questions in italics are probe questions that you may or may not need to ask in order to get at specific behavioral examples.

		outgoing & promotes diversity	
name	appearance & sense of style	group a questions	group b questions
	use the space below to record your description of the candidates' appearance and sense of style	[1.] How would others (e.g., friends, family, coworkers) describe your personality? What are the strongest characteristics of your personality? *Please give me an example.* 2. How much of your time do you like to have to yourself versus hanging out	[1.] What is your definition of diversity? Is diversity important in the workplace? Why or why not? 2. How have you helped create a situation where people of different backgrounds felt included and respected? *Please give me an example.*

		with others? *Please give me an example. What do you like most about interacting with others?* 3. How have you maintained positive and friendly interactions with others? *Please give me an example.*	
1.		[She tells you what she thinks good leadership skills]	[Diff/types of people good, so you can get to know diff. people]
2.			
3.			
4.			

Instructions: Indicate each candidate's competency rating in the appropriate columns below, and then add the ratings together across the row to determine each candidate's total score. After adding the ratings across competencies, indicate with an "X" the Hiring Recommendation based on the range within which the candidate's score falls.

candidate name	outgoing & promotes diversity	sophistication & aspiration	appearance & sense of style	total score	hiring recommendation: highly recommended	hiring recommendation: recommended	hiring recommendation: not recommended
Samantha Ehauf	[2]	[2]	[1]	[5]			[X]

hiring recommendation	scores
outstanding highly recommended	appearance = 2 or 3 and total score = 8 or 9
meets expectations recommended	appearance = 2 or 3 and total score = 6 or 7
below expectations not recommended	appearance = 1 or total score = 3 to 5

section III: interview questions & notes

Choose 1 question from each group. Repeat the question to each candidate. Questions in italics are probe questions that you may or may not need to ask in order to get at specific behavioral examples.

sophistication & aspiration		
name	group a questions	group b questions
	1. Why do you think you will be successful at Abercrombie & Fitch? 2. What things are you successful at? *Please give me an example?* 3. How have you typically reacted when things were not going your way? *What did you do?*	1. How would you describe the Abercrombie style? 2. What distinguishes the Abercrombie brand from other brands? 3. How do you think Abercrombie wants to be perceived by its customers?
1.	[Been in retail Knows how to sale things to people]	[Preppy! last longer/does not look cheap!]
2.		
3.		
4.		

Abercrombie & Fitch

Store Associate Handbook

Policies and Benefits for All Store Associates

This section of the associate handbook highlights policies and benefits that are applicable to all full-time and part-time store associates.

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Incidents occur which demonstrate the associate has used poor judgment, failed to meet reasonable performance expectations, or failed to follow direction from management and which are serious enough in nature to warrant formal disciplinary action. In each case, immediate improvement is expected. Failure to make the necessary improvements can result in additional disciplinary action. Depending on the circumstances, a final warning or termination of employment may occur if performance issues are not resolved. Where deemed appropriate by management, an associate's employment may be terminated immediately and no UPN issued.

Appearance/Look Policy.
When people think of Abercrombie & Fitch, they think of lifestyle clothing with great attitude, a comfortable fit and the best quality. As an associate of Abercrombie & Fitch, you should always strive to project a professional image that is consistent with our reputation as the best in the fashion industry.

We realize that your manner of dress and grooming habits are highly personal and subject to your own tastes and preferences. We wish to respect your individuality and still maintain a consistent level of dress and grooming that represents what people expect from Abercrombie & Fitch.

We do not require that associates buy or wear clothing, accessories or other items from our stores. Associates should, however, wear clothes that are similar to the Abercrombie & Fitch brand. Associates are prohibited from wearing apparel that is clearly that of

a competitor (i.e. has an obvious label, name or logo of a competitor). If an associate is unsure about whether a particular item of apparel is permissible, the associate should ask the Store Manager for clarification.

Expectations of all associates:

- Represent Abercrombie & Fitch with natural, classic American style;
- Look great while exhibiting individuality;
- Project energy and enthusiasm make the store an inviting place that provides an exciting and energetic social experience for the customer;
- Greet and assist customers providing excellent customer service;
- Maintain the store presentation as directed by store management.

Diversity: Abercrombie associates represent American style. America is diverse, and we want diversity in our stores. We do not discriminate, and will not tolerate discrimination in hiring based on gender, age, race, color, religion, national origin, sexual orientation, marital status, veteran status, citizenship, ancestry, or disability.

A&F Look Policy Guidelines

Hairstyle: For men and women, a clean, natural, classic hairstyle is acceptable.

Makeup: Makeup must be within these guidelines, and must be worn to enhance natural features and create a fresh, natural appearance.

- Foundation, base or blush can only be worn if it is applied in such a way as to look completely natural (i.e., to match natural skin tone);
- Eyebrow pencil, eye liner and eye shadow are acceptable in natural color;
- Lipstick should be very natural in color and applied to compliment the associate's appearance.

Fingernails: Clean, presentable fingernails are a must. Fingernails should not extend more than 1/4 inch beyond the tip of the finger. Although a natural nail is preferred, if polish is worn, it should be clear or natural in color. Any color of polish other than a natural color is unacceptable and the associate will be asked to remove the polish prior to beginning his or her shift. Toenail polish may be worn in an appropriate color. Associates should ask the Store Manager what is considered an appropriate polish color.

Facial Hair: Facial hair, including mustaches, goatees, and beards, is unacceptable.

Tattoos: Inconspicuous tattoos are acceptable, as long as they represent the Abercrombie look as determined by your Manager.

Clothing and Footwear: Clothing and footwear style should be similar to the Abercrombie & Fitch brand. Clothing should also be consistent with the season (e.g., a heavy wool turtleneck sweater should not be worn in 90 degree heat). Even though A&F has a Gym Issue clothing line, clothing worn at work should not be too informal (e.g. no gym shorts). Clothing choices should be clean and classic, not

provocative (e.g., tanks should be worn with an undergarment). Footwear should not be dirty or have excessive tears. All clothing and footwear choices should reflect what a customer would expect to see when they think about the Abercrombie brand. Any questions pertaining to appropriate clothing or footwear should be addressed to the Store Manager.

Caps: Even though A&F sells caps, they are considered too informal for the image we project. Caps are not allowed to be worn on the sales floor.

Jewelry: Jewelry must be simple and classic. If the first thing a customer notices on an associate is his or her jewelry, then it does not meet this requirement. No more than two earrings in each ear can be worn at a time for women. Earrings should not be larger than a dime and should not dangle. Earrings can be clip-on or pierced, but must be worn on the bottom of the earlobe. The shape of the earring must be in good taste. Men are not allowed to wear earrings.

No other pierced jewelry is appropriate (e.g., belly button rings, nose rings, pierced lips, tongue rings, and eyebrow piercings). If jewelry does not meet these guidelines, the Store Manager may ask the associate to remove the jewelry.

Compliance: Every associate and Management Team Member is responsible for following the A&F Look Policy. Ensuring consistent administration of the guidelines of the A&F Look Policy is the responsibility of all levels of management.

- All A&F associates and Managers are covered by the policy.
- Associates who do not meet the A&F guidelines will be informed of the specific area(s) of non-compliance and told that the Guidelines must be met immediately.
- Appropriate disciplinary action will be taken to ensure compliance with the policy, up to and including termination of employment.

Smoking

Smoking is not permitted anywhere on Company premises. Smoking is only permitted in designated mall areas or outside of the store.

Drug-Free Workplace

Abercrombie & Fitch is committed to achieving and maintaining a drug and alcohol free workplace. The use of illegal drugs, on or off the job (including meal and break periods) by an Abercrombie & Fitch associate will not be tolerated and will result in disciplinary action up to and including termination. Illegal drugs include illegal narcotics, inhalants, any substance used to achieve a chemically induced effect on the mind (except tobacco), as well as prescription drugs not prescribed for the associate by a physician ("illegal drugs"). Abercrombie & Fitch associates who use illegal drugs are responsible for changing their behavior and, if necessary, seeking rehabilitation. The cost of rehabilitation services provided to associates may be reimbursable under the associate's group benefit plan (see medical coverage section of the Full-Time Associate Addendum of this handbook for details of cover-

age). Abercrombie & Fitch will not tolerate an associate coming to work or being on company property under the influence of alcohol or illegal drugs, or the use of these substances while at work on company property. For the purposes of this policy, company property includes all stores, offices, facilities, parking lots and any other locations recognized as a place where Abercrombie & Fitch does business.

Abercrombie & Fitch reserves the right to require an associate to be tested for the presence of alcohol or drugs, or to resign, when there is reasonable suspicion of drug or alcohol use while at work. Associates who violate this policy will be disciplined, up to and including termination.

The serving and consumption of alcoholic beverages at functions planned, sponsored or hosted by Abercrombie & Fitch are reserved for group meetings, or celebrations where no further business is anticipated for the day, and must otherwise be in compliance with all state laws. Prior approval from Human Resources is required in order to have an Abercrombie & Fitch sponsored or hosted event.

PLAINTIFF'S EXHIBIT 6

PLAINTIFF'S
EXHIBIT
7

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil Action No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

ABERCROMBIE & FITCH STORES, INC.,
D/B/A ABERCROMBIE KIDS

Mar. 4, 2011

DEPOSITION OF RANDALL W. JOHNSON

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* * * * *

[21]

* * * * *

Q. So as a district manager you had the authority to hire and fire employees; is that correct?

A. Yeah. Yes, sir.

Q. You kind of hesitated. Why don't you explain that for me, then.

A. Well, I mean, we didn't do the actual hiring in the store because, like I said, I had seven stores. Every store has about a hundred employees, so I can't hire and

fire a hundred employees in seven different stores, so they were—they were solely towards the store manager's responsibility. Like I said, I just [22] interviewed and hired MITs.

* * * * *

[34]

* * * * *

Q. Okay. Okay. And do you recall in 2008 who was the HR manager or the Abercrombie Kids store?

A. It was Heather.

Q. Was that Heather Cooke?

[35]

A. Yes, sir.

* * * * *

[43]

* * * * *

Q. (By Mr. Lee) Let's go to June of 2008 if I can take you back. Do you recall an applicant by the name of Samantha Elauf?

A. Yes, sir.

Q. Had—prior to Ms. Elauf ever making application to Abercrombie & Fitch, did you know her?

A. No, sir.

Q. And did you never know of her?

A. No, sir.

[44]

Q. And—well, why don't you just tell me what you remember about the whole application or—of Samantha Elauf as we sit here today.

A. Okay. Heather Cooke interviewed Samantha. I was in Oklahoma City at my Penn Square store. She—she called me and asked me if she could hire this girl, Samantha, and I asked her did she do an interview guide. She said yes. We went through some of the questions, and we went over some look policy questions, and she wasn't complying with that, so at the end of the concession—or discussion I told Heather, I was like, is she compliant with the guideline, does she pass, and she was like no, and then I was like, well, there's your answer. You cannot hire her.

Q. Okay. Well, let's break that down. So what exactly did Heather say she was not compliant with?

A. Dress code.

Q. And what did she say that was not in compliance with?

A. She wearing a hat, or a head scarf.

Q. And did Ms. Cooke tell you why Samantha was wearing a head scarf?

A. No, sir.

Q. So it is your recollection today that Ms. Cooke didn't explain to you that she thought [45] Ms. Elauf was wearing the head scarf for religious reasons?

A. No, sir.

Q. And can you tell me how—how the head scarf is not compliant with the dress code?

A. It's in our code of conduct or in look policy that you cannot wear a hat while on the floor.

Q. I'm sorry. Could not wear a what?

A. A hat—

Q. Okay.

A. —while on the floor.

Q. I'm going to hand you what's been previously marked as Exhibit No. 8. And not to kill any more trees, this is from a previous deposition. I'm just going to have you turn to the look policy in that particular handbook to see if you can find it right quick. I believe it's on page 29.

A. 29. Yep.

Q. First of all, is that document, Exhibit 8, is that the Abercrombie & Fitch handbook, store handbook?

A. Yeah. I'm guessing yes.

Q. Okay. Well, I mean, are you familiar with the document enough that—have you ever read—

A. Yes, sir.

Q. —the store associate handbook?

[46]

A. Yes, sir.

Q. All right. I understand that—so on the look policy on—is that the Abercrombie dress code which is called look policy on pages 29—

A. Yes, sir.

Q. Okay. And so when you say you're referring to not able to wear a hat, could you tell me where that is in the look policy?

A. It's not in this revised version, but there—this has been revised since I've been in the company probably four or five times, so—

Q. And when you say it's not in the policy, can you—you're saying not wear a hat or cap is not in there on page 29 or 30?

A. Let's see. No. It says—it says a hairstyle needs to be—classic hairstyle is acceptable.

Q. Okay. What page are you reading from?

A. 29.

Q. Okay. If you'll turn to page 30 and see if there's a cap provision or a hat provision that you were referring to.

A. Clothing.

MR. CLARK: You want me to point him to the paragraph that starts caps?

[47]

MR. LEE: That's fine.

THE WITNESS: Oh, I'm sorry. All right. Yeah.

Q. (By Mr. Lee) So there is—can you just read that for the record what's the cap policy?

A. Just, you know, sales caps, they're considered too informal for the image we project. Caps are not allowed to be worn on the sales floor.

Q. Okay. And so it's your understanding that when Ms. Cooke was talking to you about a head scarf, is this the provision you were telling her that was not compliant with the dress code?

A. Yes, sir.

Q. Is there any other provision in the Abercrombie look policy that deals with wearing a head scarf?

A. No, sir.

Q. And was it your determination that if somebody's wearing a head scarf, then they're not in compliance with the look policy for Abercrombie?

A. In my eyes a head scarf and a cap is the same thing.

Q. Okay. Have you ever seen a head scarf worn by a Muslim woman?

A. On TV.

[48]

Q. Okay. Never shopping in any of the stores?

A. No, sir.

Q. I'm going to hand you what's been previously marked as exhibits—Plaintiff's Exhibits 6 and 7 and ask if you've ever seen these photographs before.

A. No, sir.

Q. Okay. I'm going to represent you and its' been testified that that is Samantha Elauf.

A. Okay.

Q. Is it your recollection that you had never seen her in the stores before?

A. No, sir.

Q. Okay. And I'm going to represent to you that the head scarf she's wearing is very similar to the head scarf she was wearing on the day that she applied or was—

A. Okay.

Q. —interviewed by Ms. Cooke.

A. Okay.

Q. So you're telling me that the head scarves being worn in Exhibit 6 and 7—Exhibits 6 and 7 would not have complied with the Abercrombie look policy?

A. No, sir.

Q. And if you had a question—hypothetically if you had a question whether a head scarf was—was the [49] same as a cap, who would you have called to determine whether or not that complied with the look policy?

A. I would have called my HR manager.

Q. So the HR department rather than the—Eric, Mr. Hoffman; is that correct?

A. Yes, sir.

Q. So is it your understanding that the HR department is responsible for compliance with the look policy?

A. Yes, sir. I mean—yes, sir.

* * * * *

Q. (By Mr. Lee) Mr. Johnson, we were talking previously about the telephone call that you had with Ms. Cooke. I just wanted to go over a few things with [50] that.

A. Okay.

Q. So about how long a phone call did this—did this conversation transpire? How long?

A. Maybe five minutes, ten at the most.

Q. And how did she—when she called you, now did she present the problem to you?

A. She called and said she just went through a group interview. She said she has this—this girl, Sam, that she wants to hire but she had some issues with her with her wearing a head scarf, and she wanted to know what she should do in the situation.

Q. Did you say—did you ask Ms. Cooke a question along the lines of can she take the head scarf off?

A. Did I ask her that?

Q. Yes.

A. I can't recall.

Q. And did she have—so at that time that she's calling, was there any other issues dealing with non-compliance with the dress code other than the head scarf?

A. Not that I know of, no, sir.

Q. Was there any other issues with regard to the interview guide or not meeting the standards on the [51] interview guide?

A. Not that I know of.

Q. Not that Ms. Cooke related to you; is that correct?

A. Yes, sir.

Q. Was it—was it your impression that Ms. Cooke would have hired Samantha Elauf except for wearing of the head scarf?

A. Yes, sir.

Q. In fact, did she state that to you?

A. That she would, yes, sir.

Q. And I can't recall your exact phraseology, but you basically instructed—well, let me back up. So when Ms. Cooke—she was asking your permission to go ahead and hire her; is that correct?

A. She was asking my permission, yes, sir.

Q. And your—and you told her what?

A. Her response is she's not compliant with dress code, that she cannot be hired.

Q. Did you have a discussion on how she might come in—how the applicant might come into compliance with the dress code?

A. Not that I recall.

Q. Was that—looking back, was that—how many time had Ms. Cooke asked you about—questions about [52] hiring applicants?

A. She never has in the past.

Q. So this was an unusual circumstance; is that correct?

A. Yes, sir.

Q. Did you at that time think we might want to call HR at that time?

A. No, sir, I didn't.

Q. And did—during this conversation did Heather Cooke tell you that she had already filled out the interview guide and given her the grade on the evaluation that she was—what's the word I'm trying to say—she was eligible for hire?

A. She said she filled it out, but she didn't say she was eligible for hire.

Q. But did she already talk—or she didn't tell you that she had already made a score on the grading scale on the evaluation standards?

A. I can't recall that.

Q. So the best of your recollection did you ever tell her that she needed to go back and fill out a different form?

A. No, sir, I never did.

* * * * *

[69]

* * * * *

Q. And let's go back to—to the Abercrombie Kids store. Do you recall during the time that you were the district manager whether or not they had allowed anybody to—any employees who worked there that were allowed to have an exception to the look policy?

A. There's no one that had exceptions.

Q. Were you ever aware of, I guess, the—Mr. McJilton allowing a young lady to wear a denim skirt that was not in compliance with the look policy?

A. I was never aware of it.

[70]

Q. And if Mr. McJilton was allowing this person to wear that or granted the exception, who was he supposed to get that cleared through?

A. He was supposed to get it cleared through the DM and the HR department.

Q. And was there a difference as to granting any exceptions to the look policy as to somebody working in the impact position as opposed to the model position?

A. was there any exception? No. They were all the same guidelines.

Q. And that—the same guidelines, both positions are covered by Plaintiff's Exhibit No. 8; is that correct?

A. Yes, sir.

Q. And looking at Plaintiff's Exhibit No. 6 and 7, would Samantha, to your own opinion, been a good candidate to hire as a model except for the head scarf?

A. If she was—yeah, she would have been.

Q. So now we've had—we're going back to post picket line, I guess is the demarcation line. Other than corporate counsel, do you recall having any other discussions with anybody from corporate about the nonhiring of Samantha Elauf?

A. No, sir.

Q. During the time that you were—from 2001 to [71] 2009, were you—were you aware that Abercrombie was actually allowing exceptions to look policy in other stores?

A. Was I aware?

Q. Yeah, nationwide.

A. No. I mean, if there was an exception, you would have to go contact your HR manager and they would make those exceptions.

Q. What I'm trying to find out is if you were aware that in other stores in Abercrombie & Fitch they had actually allowed store models to wear a yarmulke.

A. I wasn't aware of that, no.

Q. In your opinion would a yarmulke not have been allowed in any of your stores in the Oklahoma region?

A. My opinion? I mean, it's still a hat. It's still a ball cap or a cap.

Q. And that's what I was trying to determine. So in your opinion as when you were a district manager you wouldn't have seen any difference between if an applicant wanted to wear a yarmulke versus a head scarf; is that correct?

A. No, sir. Or a ball cap or a helmet for all that matters. It's still a cap.

Q. Let's take your ball cap example. So if an applicant said—came up and said, hey, my religion [72] says I need to wear this ball cap while working, you still would have denied—

A. Still would have denied them, yes, sir.

Q. Well, let's walk through the steps of the person with person with religious ball cap. If you had become aware or the assistant manager said, hey, this person says they have to wear this ball cap for the California Angels and said it's because of religious purpose, what would the process have been for considering that ball cap?

A. For considering, we would have to contact my HR director, and they would make that exception or determination if we could hire them or go forward with that applicant.

Q. Okay. And during your time as a district manager had you ever contacted your HR regional manager to talk about or discuss somebody who had requested an exception to the look policy?

A. I've never had to make an exception, no, or make—or call HR to make an exception.

* * * * *

[73]

* * * * *

Q. Okay. And as to any—your training, do you recall any actual training on religious accommodation?

A. Any training?

Q. Any training.

A. Besides just roll it up to HR and they make the decision, that's it.

Q. That's kind of what I was probably getting at, is, how would you know if somebody was requesting a religious accommodation?

A. I mean, I would—hopefully they would ask, and then we would go from there and be like, this is a religion accommodation, and we'd ask our HR manager about it.

* * * * *

[86]

* * * * *

Q. Going back to your conversation with Heather Cooke when she was asking whether or not she could hire Samantha Elauf, were you aware that she's testified that she did explain to you that the reason Samantha wore a head scarf was because of religious reasons?

A. She never said that to me.

Q. Okay. And were you aware that Heather Cooke has also testified that you made some remark about a person could paint themselves green and call it a religion?

A. Don't recall making that conversation.

Q. Okay. And Ms. Cooke has also testified that in that conversation with you about Samantha Elauf it was her testimony that she stated that she wore the scarf for religious reasons because she, she being Samantha Elauf, was Muslim. Do you recall that in your conversation?

A. No, sir.

Q. Is that something that you would forget?

A. Would I forget? I mean, if it's a religion issue I'd have to—as soon as I—I have to roll it up to HR. She never said that. She said she wore a [87] **head scarf.**

Q. Okay. So these statements that Ms. Cooke is testifying that in a conversation she had with you, are

you just not recalling those conversations or she did not make those statements to you?

A. She didn't make those statements to me.

Q. And the statement about the person being painted green, you said you did not make that statement?

A. No, sir.

Q. And did you—Ms. Cooke also testified that you told her to change the interview evaluation score so that Ms. Elauf could not—would not have a high enough score to be recommended for hire. Do you recall saying that to her?

A. I never said that.

Q. Did you ever tell her to go back and fill out the evaluation standard guide?

A. No. She was supposed to be filling that as she went through the interview guide.

Q. Do you recall telling Ms. Cooke that if she talked about any of the reasons why Samantha Elauf was not hired that our jobs could be in jeopardy?

A. I do not recall.

Q. That one is that, you don't recall or is that [88] something you could have said but you don't remember?

A. I didn't say that. I mean, if she did the proper procedures and did what she was supposed to do, at the end of the day if she—she violated dress policy we can't hire her.

Q. No, I understand. But after the picket line came out, did you ever tell your store managers that their jobs could be in jeopardy if they talked about why Samantha Elauf was not hired?

A. I mean, if they talked to reporters they violated policy. They could be fired for that, yes, but I never said anything about Samantha, no.

Q. Okay. And if they just talked to reporters, was the instruction given not talk to reporters?

A. Not, yes.

Q. Okay. Did that go for talking to anybody else about the—

A. About the circumstance, yes, sir.

Q. Okay. And did—did you feel that was a threat to the managers that their job would be in jeopardy?

A. Not as—I mean, staying within policies that they shouldn't, no.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., DEFENDANTS

Jan. 10, 2011

SUPPLEMENTED WRITTEN TESTIMONY OF DR. ERICH A. JOACHIMSTHALER

I. Introduction and Credentials

I, Erich Joachimsthaler, Ph.D., hereby states as follows:

Qualifications

1. I am the Chief Executive Officer of Vivaldi Partners, a strategic marketing and brand strategy consulting firm with headquarters in New York and offices in Munich, Hamburg, Zurich and London. I am also a Visiting Professor of Business Administration at IESE (Instituto Superiores de la Empresa) in Barcelona, Spain and New York, one of the leading global business schools

offering MBA and global executive education programs.

2. I am recognized as an authority on marketing strategy and building strong brands and have been a professional in the branding and marketing field for more than 20 years. I have provided expert brand and marketing advice to a diverse set of clients in industries such as fashion, entertainment, retailing, automotive, durables, and consumer packaged goods, for all segments of consumers from kids to teenagers and adults. I have assessed the value of brands and their potential for development in several hundred situations, and I have led research in the building of strong brands or well-known trademarks.

3. Before founding Vivaldi Partners, I co-founded a company with Professor David A. Aaker called Aaker-Joachimsthaler & Partners, which we sold to Prophet in 1999. I was a Chairman at Prophet before founding Vivaldi Partners.

4. I have previously held faculty positions at the Darden Graduate School of Business Administration at the University of Virginia, the University of Southern California, the University of Houston in Texas, and IESE (Institute Estudios Superiores de la Empresa) in Barcelona, Spain.

5. In 1988, I completed a post-doctoral fellowship at the Harvard Business School. In 1985, I received my Ph.D. in Business Administration (with emphasis on statistics and marketing) from the University of Kansas. In 1981, I received my

Master's Degree of Science (with emphasis in quantitative methods) and in 1979, I received my Economics degree from the Fachhochschule Giessen-Friedberg, Germany.

6. I have published extensively. There are over 60 of my articles in peer-reviewed academic as well as professional journals and magazines such as *Harvard Business Review, Journal of Marketing Research, Journal of Marketing, Journal of Consumer Research* and *Sloan Management Review.* My last two books are *Brand Leadership: The Next Revolution in Building Strong Brands*, which I co-authored with David Aaker, published by The Free Press in January 2000 and *Hidden in Plain Sight: How to Find your Company's Next Growth Strategy*, published by the Harvard Business School Press in May 2007. A more detailed summary of my training, past experience and prior testimony appears at the end of this document.

7. I am being compensated at my normal and customary hourly rate. My consulting firm is also being compensated for the time spent by its research staff at their normal and customary hourly rates. The individuals involved in this matter and their respective hourly rates are as follows: Erich Joachimsthaler—$700; Tammy Tan—$350; Andrew Holland—$250; and Julia Wolfe—$200.

Summary of Issues

8. I have been engaged by the Attorneys of Abercrombie & Fitch Stores, Inc. ("ANF") to render

my expert and professional opinion on ANF's branding and marketing strategy regarding the Abercrombie & Fitch brand, and abercrombie which offers similar merchandise to younger tween consumers (collectively, "Abercrombie"). Specifically, I was asked to consider the following:

- The nature of apparel marketing and retailing to tweens and teens, and the importance and value of brands and brand management for an apparel brand such as Abercrombie.
- The Abercrombie brand and the importance of the brand experience. In particular, the role of the in-store retail experience in conveying the Abercrombie brand identity and associations to its target segment, and the role played by store employees in this connection.
- The role and importance of Abercrombie's Employee Appearance/Look Policy in managing the Abercrombie & Fitch and abercrombie brand.

My opinions appear in detail in this document.

9. In order to form my opinions detailed in this report, I reviewed, among other materials, the following:

- Research from the popular press, including print media and articles related to apparel, retailing, tween and teen culture

- Research from empirical studies and written work in academic journal articles, books, and other academic literature related to brands and branding, and teen attitudes and behavior
- Research on various online communities and social networking websites such as Facebook and YouTube, and specific teen apparel and lifestyle websites such as http://www.ae.com (American Eagle Outfitters), http://www.aeropostale.com, and http://www.roxy.com
- ANF brands' websites: http://www.abercrombie.com, http://www.hollisterco.com, http://www.gillyhicks.com, http://www.abercrombiekids.com
- ANF's Annual Report for the fiscal years ended January 30, 2007 and 2010
- The Complaint related to this case, and case documents numbered A&F000001 through A&F002679
- Documents from ANF:
    - Abercrombie & Fitch New Hire Forms/ Store Associate Handbook
    - Abercrombie & Fitch Employee Quality Review Document
    - Abercrombie & Fitch Career Opportunities Booklet
    - Various issues of weekly *HR 411* Bulletins

- Various issues of the *Today at Abercrombie* Program
- Abercrombie Employee Styling Guides
- Abercrombie Employee "Greeter" Photos
- Abercrombie & Fitch Cast of Back to School Photo book 2008
- abercrombie floorset implementation instructions

- My own and my colleagues' extant work on conceptual theories, empirical research, and professional work on cognitive psychology, branding and marketing strategy.

10. In addition to the above, my team of consultants conducted interviews with executives from ANF. These executives were Chad Moorefield, Director of Stores for the Midwest on December 7, 2010; Deon Riley, Vice President of Human Resources for the Stores Organization, and Jessi Passalacqua, Director of Stores for the West Coast Region, who were interviewed on April 23, 2009; and Sunny Traub, Senior Brand Director of abercrombie and Ruehl, and Brandon Tonniges, Senior Director of Abercrombie & Fitch and abercrombie, who were both interviewed on May 4, 2009. We also made store visits to the abercrombie stores in Paramus and Willowbrook Mall, New Jersey, and the flagship Abercrombie & Fitch Store on Fifth Avenue in New York City.

Summary of Conclusions

11. Based on my analyses outlined in this report, I arrive at several conclusions which are explained and amplified in the detailed analysis that follows in this report:

    i. ANF's brands—abercrombie, Abercrombie & Fitch, Hollister and Gilly Hicks—are a critical component of ANF's business strategy, enabling ANF's business success and its ability to compete effectively in the teen and young adult fashion apparel category.

    ii. Tween and teen consumers exhibit consumption and use behaviors and purchase decision-making that are heavily identity-defining and self expressive. That is, they don't merely consume products for their utility, but rather, because of their symbolic meanings.[1] Clothing and brand names are a way of forming and expressing their personal identities. Authenticity, peer approval and accepted brand names are critical factors for brands to become part of their consideration sets. The consideration set is the set of brands that consumers find acceptable and worthy of further evaluation. To compete for tween and teen attention, ANF's brands have to deliver the authenticity, peer

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[1] Cleopatra Veloutsou and Luiz Moutinho (2008), "Brand Relationships Through Brand Reputation and Brand Tribalism," *Journal of Business Research*, 6 August 2008 (doi:10.1016/j.jbusres.2008.05.010)

approval, and need for self-expression desired by their target customers.

i. ANF has been extremely successful among its target segments because of its proactive and highly disciplined brand management practices. Through ANF's brand management, its brands have developed strong and richly brand identities with depth and texture that are compelling, appealing and desirable to their targets. These brand identities are brought to life through highly sensory in-store brand experiences that convey the Abercrombie brand identity of effortless confidence and an aspirational All-American 'preppy cool' lifestyle that embodies the brand attributes of "casual, classic, confidence, intelligence, privilege and a sense of humor."[2]

ii. The Abercrombie brand identity is communicated through no TV advertising and only minimal print advertising, and instead, through direct engagement through the in-store brand experience, including interactions with store employees. Additionally, for Abercrombie's tween and teen target customers, these store employees act as aspirational peer role models.

iii. In the field of apparel retailing, store employees play an important role in communicating the overall brand experience and desired brand image to consumers. The Abercrombie &

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[2] AFI Annual Report 2007, p. 6

Fitch Employee Appearance/Look Policy plays a critical role here, as it ensures consistent and positive portrayals of the Abercrombie brand in the important in-store environment.

iv. An employee's look or dress that is contrary to the guidelines of the Employee Appearance/ Look Policy is identity distorting and would appear visibly "off-brand" to the Abercrombie target, and negatively impact Abercrombie's ability to communicate a consistent "on brand" experience to its target consumers. In the cut-throat and fast-paced competitive environment of fashion and apparel retailing to smart, discerning and fickle teen consumers, this situation could have a negative impact on ANF's business. There is potential to cause consumer confusion and decrease brand preference and value perceptions for the Abercrombie brand. The risks to ANF include a decreased ability to effectively market to its target and establish strong emotional bonds with them; a decreased ability to retain existing customers; and increased costs of marketing and merchandising its products successfully.

II. The Role of Brands in Apparel Retailing

12. The word brand originates from the Old Norse word "brandr," which means to burn. Indeed, branding or burning was (and is) the method by which farmers mark their livestock to identify who owns them.[3] In this sense, a brand is a distinguishing name and/or symbol intended to identify services or goods.[4]

13. Today, academics, marketers, advertisers and others who manage brands conceptualize a brand as having two key components: the tangible, and the intangible. The tangible components or physical manifestation of a brand may include names, logos, images, or designs. The more important components of the brand, however, and those that give it meaning and create value, are the intangible components. These components include thoughts, images, attributes, associations, feelings, emotions and experiences.

14. When these components are brought together in a unique manner, the brand creates meaning for consumers, and has value. In order to develop value, a brand needs to connect with and engage consumers, creating a meaning for them that in-

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[3] Keller, Kevin L. (2003), Strategic Brand Management: Building, Measuring, and Managing Brand Equity, 2nd Ed., Englewood Cliffs, NJ: Prentice-Hall, p. 3

[4] David A. Aaker, Managing Brand Equity, The Free Press, 1991, p. 10

tersects with their daily lives.[5] This value is often defined in terms of functional benefits, emotional benefits, and/or self-expressive benefits. These three benefits make up a brands value proposition.[6] Fashion apparel brand's offer significant functional, emotional and self-expressive benefits to consumers. These could be described as follows:

- Functional benefits (e.g. I wear Gap because their clothes are affordable and durable)
- Emotional benefits (e.g. wearing Bebe makes me feel confident, sexy, and flirtatious)
- Self-expressive benefits (e.g. by wearing Chanel, I convey that I am sophisticated and classically elegant).

15. These benefits combine to create value to consumers at the brand-relationship level. In my book with David Aaker, *Brand Leadership*, I describe how functional, emotional, and self-expressive benefits translate into the brand-customer relationship—that is, the brand experience that a consumer has with a brand. Based on the elements of the brand identity and benefits these elements imply, consumers ascribe meaning to the brand. Meaning creation is highly com-

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[5] Joachimsthaler, *Hidden in Plain Sight*, Harvard Business School Press, Boston, MA, 2007

[6] David A. Aaker and Erich Joachimsthaler, *Brand Leadership* (The Free Press, 2000), pp. 49-50

plex and the result of a well-known and oft-researched interpretation process.[7] The final brand relationship that consumers have with a brand can be characterized or summarized in typical relationship constructs (e.g. a partner, a mentor, a friend, a role model).[8]

16. A brand, thus, stands for a set of associations or characteristics in consumers' minds. Metaphorically speaking, a brand can be viewed much like a box in someone's head. As people receive information about a brand (positive or negative), they file it away in the mental box labeled with the name or logo or symbol of the brand. After repeated exposure to or experience with a brand, the consumer will have a number of things, information or perceptions about the brand stored in this mental box.[9]

17. Although brands are generally considered intangible, they are often amongst the most valuable assets of a company. Strong brands can be worth millions, and even several billions of dollars.[10] In the latest *Interbrand Global Brand*

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[7] Richins, Marsha L. (1994), "Valuing Things: The Public and Private Meanings of Possessions," *Journal of Consumer Research*, 21 (3), 504-04

[8] Aaker, David, and Erich Joachimsthaler, *Brand Leadership* (The Free Press, 2000), pp. 40, 49-50

[9] Aaker, David, Building Strong Brands, New York, NY, The Free Press, 1996

[10] Lev, Baruch, *Intangibles*. Washington, DC: Brookings Institution Press, 2001

Valuation Study 2008, Coca-cola was the world's most valuable brand, contributing $67 billion dollars to the company's value, while IBM was the second most valuable brand at $59 billion dollars.[11] Amongst this list were a number of apparel brands: Louis Vuitton, ranked 16th with a value of $21 billion and Gucci, ranked 45th, with a value of $8 billion.

18. In highly competitive and fragmented industries such as apparel and specialty retail, brands are even more important. These are markets that constantly "bombard" consumers with advertising campaigns and fashion/lifestyle messages, and it is common for consumers to switch readily from one brand to another.[12] For companies such as ANF. a strong brand is a powerful weapon. A strong and recognizable brand is the key to driving increased store traffic that can lead to higher sales. Apparel companies and retailers constantly strive to create well known brand names that consumers will identify with high quality and/or fashionable products. They invest in their brands so that they can raise awareness, build loyalty among consumers, and use the power of the brand to dissuade consumers from switching to competitors.

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[11] http://www/interbrand.com/best_global_brands.aspx

[12] Standard and Poor's Industry Survey, Apparel & Footwear: Retailers & Brands, Marie Driscoll and Pearl Wang, February 12, 2009

Benefits to Apparel Retailers

19. A brand provides a number of benefits to retailers (or brand owners) and consumers. In terms of benefits to specialty retailers, strong brands provide a means of differentiating their products from the competition in order to generate consumer preference and choice, charge higher prices, and achieve higher customer loyalty. A strong brand can help to sustain relevance amidst constantly changing tastes, and rapid turnover cycles of consumers. This applies especially for apparel targeting tweens and teens. For example, a typical teen target market of 14-18 year-olds (or a tween market of 9-14 year olds) means that every 5 years, an apparel company is addressing a completely new group of consumers. Fashion companies targeting teens must therefore carefully manage their brands through constant renewal of their brand positioning and user imagery, to maintain relevance with each new cycle of consumers.

20. Another benefit of a strong brand is providing the basis for brand extensions, which involve using an existing brand name to introduce new product offerings, access new market segments or new categories, and generate new revenue streams as a result. Examples of brand extensions in the apparel industry include Nike Golf, Gap Kids, Levi's Red Tab, and Diesel Style Lab.

21. Yet another important benefit is building and sustaining competitive advantage over other apparel

retailers and brands in the market. Apparel companies with a strong orientation toward building brands achieve advantages in the following dimensions: merchandising, communications, trading format, and customer service.[13] For specialty apparel retailers such as ANF, superior brand strategy often translates into a sustainable competitive advantage: it creates barriers for competitors to be able to lure away loyal customers; it gives distribution leverage by enabling ANF to demand and get the best mall locations; and it gives more pricing flexibility by creating a "must have" perception to the consumer—enabling a premium pricing strategy.[14]

Benefits to Consumers

22. From the consumers perspective, brands serve to identify the source or maker of a product and allow consumers to assign responsibility to the brand owner. A strong brand helps to reduce the perceived risk inherent in their purchase decisions. For teens and young consumers, apparel products can carry significant risks of style perceptions and peer-group acceptance. Consumers

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[13] Kerry Bridson and Jody Evans. The Secret to a Fashion Advantage Is Brand Orientation, *International Journal of Retail & Distribution Management*, Vol. 34, Number 8, 2004

[14] Standard and Poor's Industry Survey, Apparel & Footwear: Retailers & Brands, Marie Driscoll and Pearl Wang, February 12, 2009

cope with these risks by purchasing well-known brands.[15]

23. Strong brands also deliver emotional and self-expressive benefits to the consumer. The perception of the brand, combined with the actual features of the piece of clothing, can make a consumer feel completely different emotionally: sexy, comfortable, trendy or exclusive, for example. Consumer purchase decisions in fashion and apparel often take into account the emotional aspects of the brand. As fashion items, consumer apparel brands offer significant self-expressive benefits to consumers who wish to project a certain image or persona to others. A wearer of a certain brand of jeans may express to others that he or she is stylish, young and hip (e.g. 7 for All Mankind jeans), or no-frills and unpretentious (e.g. Levi's jeans).

24. Because of the benefits of brands to consumers, consumers tend to behave in a positive way toward strong brands. Consumers tend to exhibit (a) a greater willingness to consider the brand's products, (b) a greater receptivity to marketing information about a brand's products, (c) a stronger desire or aspiration for the brand's products, (d) a greater loyalty and willingness to purchase the brand again, (e) a greater tolerance toward the brand in case of product failure or problems, (f) a greater willingness to pay for the

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[15] Kevin Lane Keller, *Strategic Brand Management*, Prentice Hall, Upper Saddle River, New Jersey, 2003

brand's products, and (g) a greater willingness to recommend the brand to other consumers. In the highly competitive world of apparel and fashion retailing, these are all the more vital for companies such as ANF

25. In summary, strong brands are hugely valuable assets that provide enormous benefits to apparel retailers and their brands. For all these reasons, ANF's brands are an absolutely business-essential asset to ANF's business success. They enable ANF to create differentiation in the marketplace, establish relevance and meaningful relationships with its consumers, and also to create the kind of value for ANF and for its tween and teen consumers as described so far. In the following section, I will describe how the ANF's brands successfully operate in the teen fashion market, and the importance of the overall brand and retail store experience as part of this.

III. Fashion Marketing and Retailing Toward Tween and Teen Consumers

26. Abercrombie & Fitch's primary target customers are teens and college kids aged 18-22. Its extension abercrombie's primary target customers are pre-teens (tweens) and young teens. It offers clothing extending downward to those aged 8, and upward to those aged 16. Through the abercrombie extension of Abercrombie & Fitch, ANF is able to capture consumers as they move along their life journey. Tweens who want to emulate their older siblings or role models can do

so by wearing the same clothing styles, specially made just for them in a smaller size.

27. For pre-teen and teen apparel brands, generating preference, choice and loyalty among tweens and teens is no easy task. To be successful, these brands need to understand and adapt to the discerning and fickle teen psyche, attitudes, habits and behaviors. Based on this understanding, they must craft a marketing and retailing strategy that is believable and accepted by this segment's unique behaviors and attitudes. Finally, in order to be accepted by the teenage consumer, a brand must have a flawless execution, with enough flexibility built in to keep up with fast-changing tastes and demands of this fickle segment.

The Importance of Identity, Self Expression, and Peer Influence

28. Pre-teen and teenage years are a time of exploration, self-discovery and expression. Establishing an identity becomes increasingly important in the passage toward adulthood, and tween and teen behavior and purchase decision-making become increasingly based on the desire to express their identity. Teens especially are highly attracted to symbols, materials, and signals that showcase their identity during this time. For teens, clothing and brand names are a way of forming and expressing their identities and there-

fore, they are very particular about the brands they will associate themselves with.[16]

29. In addition to self expression, their friends, and peer approval are extremely important to the tween and teen consumer. During this time of self-discovery, pre-adolescents and adolescents aim to broaden their horizons beyond their families to form connections, and thus, their friends and being part of a group can become central to their lives.[17] Peer groups exert an enormous influence on them. For teens, it has been documented that they "tend to imitate each other, not adults. Teens spend almost all their time with peers and virtually no time with adults."[18]

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[16] See David A. Aaker and Erich Joachimsthaler, *Brand Leadership* (The Free Press, 2000), pp. 48, 49-50, Joachimsthaler, Erich, John Lastovicka, Optimal Stimulation Level—Exploratory Behavior Models, *The Journal of Consumer Research*, Vol. 11, No. 3 December 1984. Epstein, Robert, *The Case Against Adolescence: Rediscovering the Adult in Every Teen*, Quill Driver Books, Sanger, CA, 2007, p 277. Zollo, Peter, *Getting Wiser to Teens: More insights into marketing to teenagers*, New Strategist Publications, Ithaca, NY, 2004 p 325. Underhill, Paco, *Why We Buy: The Science of Shopping*, New York, NY, Simon & Schuster, 1999 pp 151-152

[17] Lerner, Richard M., The Good Teen: Rescuing Adolescence from the Myths of the Storm and Stress Years, Crown Publishers, New York, 2007, p 112, 160-161

[18] Epstein, Robert, The Case Against Adolescence: Rediscovering the Adult in Every Teen, Quill Driver Books, Sanger, CA, 2007, p 174

30. Peer pressure plays a similarly big role in tweens' buying behavior: a survey of 1,306 U.S. children showed that 36% of tweens ages 8-12 agree that they often pay close attention to advertisements to make sure they buy the right products and 36% also say that they often look to see what their friends use and buy when making purchase decisions, and 62% like to buy things their friends have.[19] As tweens navigate the passage between the safe embrace of family and the world outside the home, having the right merchandise seems vital to easing that transition, proclaiming them members of a new in-group.[20]

31. Peer approval and acceptance is especially important when teens make decisions like purchasing apparel. Clothes are a crucial way that teens can identify with their peer group.[21] Even during the browsing (or shopping) phase of an apparel purchase, teens are much more likely to bring friends along with them to gain their approval before they buy. Once they make their purchase decision (with their friends), they will then return to the store with their parents (who are usually paying for the item), who will assist

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[19] Online survey by Harris Interactive in collaboration with the University of Delaware's Lerner College of Business and Economics

[20] Kit Yarrow, a professor of consumer psychology at San Francisco's Golden Gate University, from "How to Hype-Proof Your Tween", Jeffrey Kluger, *Good Housekeeping*, accessed online on December 8 2010

[21] Kersting, Karen, Driving teen egos--and buying--through 'branding', *Monitor on Psychology*, June 6, 2004 p 60

them in the much quicker, purchasing transaction."[22]

32. Retailers like ANF have to address this paradox: the yearning for exploration, discovery and self expression, while at the same time, addressing tween and teens' desire to ensure that what they are trying and buying is tested and accepted by others.[23] At the same time, brands like Abercrombie have a specific opportunity measured in customer life stage years to market to their target segments, from the time they trade into the brand and till the time they leave the brand.

The Appeal and Importance of Brands to Tweens and Teens

33. Brand names have been documented as being important to kids, tweens and teens. Academic research has shown brand recognition to be evident in children from 7 years upward.[24] As the author Juliet B. Schor of the book *Born to Buy* on marketing to kids stated: "These days when kids ask, they ask for particular brands" A 2001

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[22] Underhill, Paco, Why We Buy: The Science of Shopping, New York, NY, Simon & Schuster, 1999 p. 152

[23] Joachimsthaler, Erich, John Lastovicka, Optimal Stimulation Level—Exploratory Behavior Models, *The Journal of Consumer Research*, Vol. 11, No. 3 December 1984

[24] Boden, Pole, Pilcher and Edwards, "New Consumers? The Social and Cultural Significance of Children's Fashion Consumption" working paper, Sept 2004, Department of Sociology, University of Leicester, from the *ESRC/AHRB Cultures of Consumption?* Working Paper Series

Nickelodeon study found that the average ten year old has memorized 300 to 400 brands. Among eight to fourteen year olds, 92 percent of requests are brand specific, and 89 percent of kids agree that "when I find a brand I like, I tend to stick with it."[25] A 2000 Griffin Bacal study found that nearly two-thirds of mothers thought their children were brand aware by age three, and one-third said it happened at age two. Even kids have clear preferences, they know which brands are cool, they covet them, and they pay attention to the ads for them. Today's tweens are the most brand-conscious generation in history.[26]

34. Academic research has shown that clothing provides an important role in identity creation, and consumers often decide whether to accept or reject products and brands on the basis of symbolic (as opposed to functional) attributes.[27] Because clothing is so readily apparent to others, accepted brand names are especially important in the apparel category—it represents a "badge" category, where clothing expresses something about the status of their users/wearers. Even starting

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[25] Juliet B. Schor, *Born to Buy*, Scribner, New York, NY, 2004.

[26] Juliet B. Schor, *Born to Buy*, Scribner, New York, NY, 2004, p. 25

[27] Banister and Hogg, "Symbolic Consumption: The Interplay Between Distinction, Distastes and Degrees of Rejection," citing Belk et al, 1982; Belk et al, 1984; Elliott, 1994; Freitas et al, 1997; Holman, 1981. Accessed at http://s1.e-monsite.com/2009/10/01/19638305roux-eacr-2005-goteborg-pdf.pdf

from childhood, academic research has shown that fashion consumption plays a key role in childhood projection of self, creativity, and identity development.[28] According to empirical research, teens are attracted to the prestige they believe brand- name clothing provides.[29] A 2007 survey of more than 2,000 13- to 17-year-olds found that teens have 145 conversations about brands per week.[30] A brand name can hold important associations in the minds of teens: "They [teens] believe in a brand name's power to confer status, cool, charisma, knowledge. They construct their identities by the shopping choices they make."[31]

35. For teens, there is a very narrow set of brands that they consider acceptable. They can be very fickle and discerning, and they frequently differentiate among brands by the relationships they have with a brand and the status it can provide them. The complexity of the teen definition of

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[28] Boden, Pole, Pilcher and Edwards, New Consumers? The Social and Cultural Significance of Children's Fashion Consumption" working paper, Sept 2004

[29] Kersting, Karen, Driving teen egos--and buying--through 'branding', Monitor on Psychology, p 60. *Adolescence Journal* (Vol. 33, No. 131) by economist Linda Simpson, PhD, of Eastern Illinois University

[30] Corcoran, Monica, These Days, Some Teens Covet Expensive Brand Names in Purses, Accessories, *Los Angeles Times*, September 25, 2007

[31] Underhill, Paco, Why We Buy: The Science of Shopping, New York, NY, Simon & Schuster, pp 151-152

what's cool often begins with their peer group: 50% of teens take fashion cues from their friends and 32% say other people at school (non friends) influence their fashion decisions. In addition, teens admit that they look to retailers for fashion ideas and that these stores influence their style.[32] Among teens, apparel brands have been ranked as among the coolest brands.[33] Simultaneously, apparel brands rank the lowest in terms of brand loyalty. This is due to the fluctuation of popularity of "in" brands, current styles and colors. This summarizes the paradox and difficult nature of teen apparel retailing—brands like Abercrombie must walk this fine line between ensuring that their bands are "cool" while ensuring that they do not fluctuate from "in" one moment and "out" the next.[34] One of the greatest challenges for brands like Abercrombie is maintaining long-term relevance for a restless tween/teen public. Against this context, it is all the more important for brands like Abercrombie to gain a deep understanding of their target's motivations and drivers, and proactively manage the brand by strategizing carefully, and executing flawlessly.

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[32] Zollo, Peter, *Getting Wiser to Teens: More insights into marketing to teenagers*, New Strategist Publications, Ithaca, NY, p 120-121

[33] Ibid, p 302-305

[34] Ibid, p 325-327

The Importance of Authenticity to Teens

36. As described, peer approval and *accepted* brand names are critical factors in getting into teens' consideration sets. In addition to these, authenticity is another hugely important factor with teens. Research on teen psychology has shown over and again that teens value honesty and authenticity; they tend to be naturally more skeptical of things that could be viewed as 'fake' or inauthentic. Studies have shown that teens can easily recognize when something is artificial, and are therefore looking for a quality of realness in the people and companies they associate with.[35]

37. Authenticity is important particularly in today's consumer environment that brands find themselves. Trust in brands has dropped from 52% to 25% between 1997 and 2007 and there is a enormous scrutiny by young consumers that brands tie back to some empirical reality.[36] Meaning can be created as has been shown by Ralph Lauren, Abercrombie and Nike but it needs to be authentic, honest, and clear in order to be considered by teens. A study on teens discovered that one of the most important things teens want from companies is that advertising be

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[35] Zollo, Peter, Getting Wiser to Teens: More insights into marketing to teenagers, New Strategist Publications, Ithaca, NY, 2004, pp 396,404-405

[36] John Gerzema and Ed Lebar, *The Brand Bubble*, Jossey-Bass, San Francisco, CA 2008; Rob Walker, *Buying In*, Random House, New York, 2008.

honest.[37] They are skeptical of brand promises that are unrealistic or less than credible. Teens are more sophisticated than ever, especially to branding and marketing, and not only can spot an artificial brand or claim; they in fact actively look for them.[38] Because teens are so critical of the authenticity of brands, brands like abercrombie need to execute their positionings perfectly and consistently in order to be accepted.

The Importance of Brand Experiences and Non-Traditional Marketing to Tweens and Teens

38. As written in Part IV of my book *Brand Leadership* and Chapter 8 of my book *Hidden in Plain Sight*, I discuss the importance of building a brand beyond traditional advertising and creating memorable experiences with consumers, because customers who share an emotional relationship with a brand will influence others and provide a strong and loyal sales base.[39] Building the brand without traditional media (e.g. TV, print) advertising is essential in tween and teen fashion retailing.[40] Tweens and teens are inundated with

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[37] Ibid, p 402

[38] Ibid, pp 402-405

[39] Aaker, David and Erich Joachimsthaler, Brand Leadership, The Free Press, 2000, Part IV, Joachimsthaler, Erich, Hidden in Plain Sight, Harvard Business School Press, Boston, MA, 2007 Chapter 8

[40] Aaker, David A., and Erich Joachimsthaler, Building Brands without Mass Media, *Harvard Business Review*, January-

media advertisements at a young age—the average teen has taken in some 140,000 messages by age 12.[41] In addition to teens being extremely skeptical and critical of marketing messages, research shows that as traditional advertising has become such a large part of their everyday lives, teens frequently tune messages out. Traditional television advertising fades into the backdrop as teens are passively involved with it, often ignoring messages right away.[42] Therefore, in order for brands to get their messages through to teenagers, they need to employ means *other* than traditional advertising—means that include being where the tweens and teens are, such as online websites and communities, and for older teens, at malls where they congregate on weekends and/or after school.[43]

39. To engage teens in particular, brands should not overload them with advertisements but rather, let fans and word of mouth do its marketing. Teenagers are "the most social of social creatures" and value friends' opinions above any traditional advertising.[44] Multi-sensory experiences play a key role in creating a brand experience, especially

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February 1997, Joachimsthaler, Erich Hidden in Plain Sight, Harvard Business School Press, Boston, MA, 2007 p. 145

[41] Zollo, Peter, p 378

[42] Ibid, p 379

[43] Ibid, pp 379-414

[44] Goodstein, Anastasia, Teen Marketing: Apple's the Master, *Businessweek*, August 16, 2007

when other youth-oriented lifestyle brands like American Eagle Outfitters, Aeropostale, or Roxy (and their related tween/kids extensions: 77Kids, P.S. from Aeropostale, and Roxy Kids, respectively), are attempting to communicate similar brand benefits to Abercrombie, so it is especially important that the Abercrombie brand engages the tweens and teens consistently through all their senses in order to gain a competitive advantage.[45]

IV. ANF's Proactive Management of Its Brands Identities and Customer Experience

40. Strong brands do not just happen by fiat. They need to be planned, developed, nurtured and managed through proactive and systematic management practices. In my book co-written with David Aaker, I covered the major components of a good and proactive system to manage brands.[46] In my work as a consultant, I have advised many leading companies in the fashion, retailing and consumer products sectors, and it is standard practice for these companies to manage and protect their brands through institutionalized and repeatable brand management systems, structures and practices.

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[45] Passalacqua, Jessi and Deon Riley, Employee Interviews, April 23, 2009

[46] Aaker, David, and Erich Joachimsthaler, *The Lure of Global Branding*, Harvard Business Review, November-December 1999, Aaker. David and Erich Joachimsthaler, Brand Leadership (The Free Press, 2000), Ch. 1

41. The most successful retail brands have highly differentiated and consumer-relevant brand propositions with clear brand identities and compelling brand experiences, and they have uncompromising standards on how to achieve this. In order to deliver brand promises to consumers that are largely intangible and consist of feelings and emotions, astute and systematic management practices are necessary. Inconsistent or haphazard management practices will result in a failure to deliver on the promises implied by a brand, leading to lowered brand equity in consumers' minds, and decreased brand ability to succeed in the marketplace.

42. Brands play a central and hugely important role in ANF's business model, and an integral part of ANF's overall business strategy. This strategy involves the creation of a highly distinct brand identity that appeals to its target segments, supported by exceptional in-store experiences that establish strong emotional connections with its customers.[47] I have analyzed ANF's procedures and activities used to manage their brands, and I will demonstrate how these have been the primary reason for the success of ANF in the highly competitive teen apparel market. My analysis is described in the following five sections:

(a) ANF's Brand Architecture

(b) The Abercrombie Brand Identity

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[47] Abercrombie & Fitch Annual Report, 2007, p 13

(c) The Abercrombie In-Store Brand Experience

(d) ANF's Brand Management Structures and Processes

(e) The Integral Role of Abercrombie's In-Store Employees

(a) ANF's Brand Architecture

43. An important component of a system of managing a brand is the *brand architecture*. The term 'brand architecture' is used to describe the organizing structure for a portfolio of brands and products. A brand architecture clarifies and specifies the various roles and relationships among a family of brands so that they can function together as a unit to create synergy, clarity and leverage.[48] There are several dimensions of brand architecture which I have extensively described in my books *Brand Leadership*,[49] *Hidden in Plain Sight*[50] and my article "The Brand Relationship Spectrum" that was published in the *California Management Review*.[51]

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[48] David A. Aaker, *Building Strong Brands*, Free Press: New York, 1996, pp. 241; David. A. Aaker and Erich Joachimsthaler, *Brand Leadership*, Free Press: New York, 2000.

[49] David. A. Aaker and Erich Joachimsthaler, *Brand Leadership*, Free Press: New York, 2000, p 136-138

[50] Joachimsthaler, Erich, *Hidden in Plain Sight*, Harvard Business School Press, 2007

[51] "The Brand Relationship Spectrum: The Key to the Brand Architecture Challenge" (co-written with David Aaker) (*California Management Review* 2000)

44. ANF has four different apparel and lifestyle brands, each with their own unique brand positioning and brand identity. While each of these four brands possesses its own unique "heritage and handwriting," they all share common elements and characteristics as a cohesive portfolio —"casual, classic, confidence, intelligence, privilege and a sense of humor."[52] These brands have been carefully planned to be able to stand independently on their own, while simultaneously working well together as a group to complement the other brands in the portfolio. Together, they have the ability to deliver unique functional, emotional and self-expressive benefits teens and young adults through each major stage and turning point of their lives, from the time they are in elementary school through high school, college, and early career adulthood. The ANF brand architecture can be described in the following table:

Brand:	**Abercrombie Kids**	**Hollister**	**Abercrombie & Fitch**
Primary Brand Target:	Pre-teens and young teens in middle school	Teens in high school	College Kids
Brand Identity and	Vintage, prep-school	Casual wear based on effortlessly cool	Preppy yet rugged casual wear inspired by

[52] AFI Annual Report 2007, p. 6

Product Offering:	style casual-wear	Southern California surf lifestyle	the Northeast and Ivy League heritage

45. As can be seen, ANF has developed different brands that have different product offerings, brand identities, experiences and sensory brand cues that are based on what are aspirational and appealing for their particular target groups, while fitting cohesively together with its sibling brands. The Abercrombie & Fitch Career Opportunities Booklet describes the ANF brands as follows:

> "Trends transcend age and our brands are a testament to this philosophy. We are experts in cool, All-American, casual wear and offer these fashions to our target consumers. As our customers grow up, the A&F brands grow with them. Our goal is to market the most aspirational lifestyle to each of our targeted age groups."[53]

By managing a portfolio of brands and retail stores that cater to distinct segments, ANF is able to capture consumers as they move along their life journey. This practice of marketing to consumers through their life stages, and keeping them "in the tent" as they grow older or move upward, is common practice. For example, adult-targeted stores generally do not mind having teenage browsers because they want to build

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[53] Abercrombie & Fitch Inc. Career Opportunities Booklet

loyalty in the early years. If a retailer can make an impact on them at that stage, it's likely to pay off in later life.[54]

(b) The Abercrombie Brand Identity

46. One of the most important aspects for proactively managing a brand is to create and maintain a clear and compelling *brand identity*. A brand identity refers to what a brand stands for and aspires to create in consumers' minds; it defines the set of associations or values that should be mentally linked to the name in consumers' minds.[55] It also defines the vision for a brand from the perspective of the strategist and therefore defines how a brand is created and maintained over time. Over the last 15 years, the development of a brand identity system as a tool has been one of the most important developments in the field of branding. Some refer to it as the brand DNA, the brand print, the brand intent, the brand story or the brand foundation. In *Brand Leadership*, David Aaker and I used the term "Brand Identity System" because to be truly successful in the marketplace, a brand must have a coherent identity much like a person has an identity. Also, I use the word "system" because defining a brand

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[54] Quote from Retailing Reality, Jie Zhang, Assistant Professor of marketing at the University of Maryland's Robert H. Smith School of Business, in Arantani, Lori, "Drool Now, Spend Later", *The Washington Post*, Monday, June 4, 2007; Page D05

[55] Aaker, David, and Erich Joachimsthaler, Brand Leadership, The Free Press, New York, NY 2000 Ch. 1.

requires a system of concepts and elements that fit together in a coherent and logical way.

47. A brand's identity can be composed of many different dimensions—such as products, the brand personality, symbols, organizational attributes, and experiences—that together, add depth, texture and detail to a brand identity. These elements together become the foundation for the value proposition to consumers which comprises functional, emotional, and self-expressive benefits.

48. ANF has created for Abercrombie a strong, well-developed brand identity. As the "younger sibling" kids' extension of Abercrombie & Fitch, abercrombie's identity is built around American Northeast prep schools while older sibling Abercrombie & Fitch is the preppy All-American classic from New England Ivy League schools. The Abercrombie & Fitch brand is described on ANF's careers website and in ANF's Annual Report as follows:

> "Rooted in East Coast traditions and Ivy League heritage, Abercrombie & Fitch is the essence of privilege and casual luxury. The Adirondacks supply a clean and rugged inspiration to this youthful All-American lifestyle. A combination of classic and sexy creates a charged atmosphere that is confident and just a bit provocative. Idolized and respected, Abercrombie & Fitch is timeless and always cool."

The abercrombie brand identity is similar to Abercrombie & Fitch, just with a younger, more youthful slant:

> "The essence of privilege and prestigious East Coast prep schools, abercrombie directly follows in the footsteps of Abercrombie & Fitch. With a flirtatious and energetic attitude, abercrombie are popular, wholesome, and athletic. Rugged and casual with a vintage inspired style, abercrombie aspire to be like their older sibling, Abercrombie & Fitch. The perfect combinations of maturity and mischief, abercrombie are the signature of all-American cool."[56]

49. Overall, the brand identity of Abercrombie is conveyed consistently and extremely coherently across all external consumer touchpoints, as well as internal employee and staff communications that I have reviewed, from internal HR management documents to recruitment material. Abercrombie's product offering is highly aligned with, and overtly communicates, its New England preppy cool brand identity: rugged casual lifestyle clothing for men, women, girls and boys, tote bags, accessories and footwear like gloves and flip flops, and fragrances.[57] The Abercrombie and associated kids product offering reflects associations such as "stylish", "vintage", "casual",

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[56] http://www.abercrombie.com/anf/careers/brands.html, accessed on December 8, 2010

[57] http://www.abercrombie.com, December 8, 2010

"active", and "rugged" The offering includes core items that add up to a very recognizable and typical all-American casual Abercrombie "look"—comprising t-shirts, polo shirts, hoodies, sweaters jeans, plaid shirts, tank tops and flip flops that are always available from year to year.

50. The Abercrombie product offering is enhanced by a compelling brand *personality*, with attributes such as attractive, effortlessly cool, All-American, easy going, and casual style. The store employees or "models" that Abercrombie chooses to represent the brand in stores appear attractive, active, and outgoing, reflecting the brand identity and aspirational all-American cool. In the Abercrombie & Fitch Career Opportunities Book, the target abercrombie customer, or "abercrombie girl" is described as 12 years old (but wants to be 17), embodying attributes such as "all-american, aspirational, happy, fun, confident, leader, casual, pretty, classic, preppy, athletic, diverse, popular, privileged." Abercrombie (kids) boys are described as being "all-american, mischievous, daring, preppy, cool, classic, athletic, rugged, clean cut, diverse, popular and privileged."[58]

51. The fact is that the Abercrombie brand has leveraged and based its brand identity off a preexisting, recognized subculture—the New England prepster. As a subculture with its own set of recognized codes, cues, dress style, vocabulary

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[58] Abercrombie & Fitch Career Opportunities Book A&F000262

and language, habits and other attributes, the "prep" or "preppy" lifestyle has been described, celebrated and even satirized in media and books such as *The Official Preppy Handbook, The Ivy Look, True Prep: It's a Whole New Old World*, and the best- selling novel *Prep* by Curtis Sittenfeld.

52. For Abercrombie, being associated with the prep subculture is a way to build consumer affinity and loyalty. Through adopting and leveraging an existing subculture's cues and codes, the equities and positive associations of the subculture can be transferred and shared with the brand. This is what I have referred to in my work as an identity-driven branding strategy, and one that leverages pre-existing contextual and cultural codes that are already important and meaningful to consumers.[59] Being associated with and leveraging an existing subculture—be it hip hop, rock 'n' roll, Goth, SoCal surfer, Hipster, New England prep, or extreme sports, just to name a few—is an extremely powerful and authentic way to build a brand.

53. Another important element or concept of a strong brand identity is *symbols*. As I have noted in my writing before, symbols and visual elements provide a "glue" or structure to hold the various elements of the brand together into a coherent

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[59] Joachimsthaler, Erich, Hidden in Plain Sight, Harvard Business School Press, Boston, MA, 2007, Chapter 8: Connecting With and Engaging Customers

identity, making it easier to gain recognition or recall, and evoke particular thoughts, feelings and emotions with a brand.[60] In the case of Abercrombie, a large number of visual identity elements come together in a coherent and logical way to create the overall brand identity: the moose logo, the prominent "A&F" or "Abercrombie & Fitch" on clothing (and for the kids line, "abercrombie" and "a&f in lower case typeface), the vintage and casual/rumpled look of the way the clothing is styled, the black-and-white and vintage toned imagery, and the pictures of attractive models amidst outdoor backdrops featuring wood and grass. All these visual elements appear collectively on Abercrombie & Fitch and abercrombie's apparel, in- store imagery and other paraphernalia. Because the brand bears symbols and motifs that are evident on its apparel, they provide a vehicle by which pre-teens and teens can proclaim that their self image is "casual, American cool." All together, these visual images add up to a representation of an aspirational ideal: rugged casual New England prep-inspired lifestyle.

54. Overall, the Abercrombie brand identity is extremely well developed, with clear depth and texture from all its multiple components that collectively add up to a very coherent identity. These components include personality attributes,

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[60] Aaker, David, and Erich Joachimsthaler, Brand Leadership, The Free Press, New York, NY 2000, p. 54

symbols and visual elements, consumer emotional and self-expressive benefits, and the leveraging of the real-life prep subculture. It is obvious that all these various brand attributes have been carefully planned and thought through by ANF, as they are highly codified and consistent across everything that I have reviewed. Additionally, the brand is expressed and enhanced through a highly sensory retail experience as I describe below, with visual, verbal, aural and olfactory cues, symbols and codes that are executed extremely consistently in a highly disciplined fashion. As I will show, an employee's appearance and dress is one, albeit critical, component of this carefully-planned and highly disciplined holistic brand management effort.

(c) The Abercrombie & Fitch and abercrombie In-Store Brand Experience

55. It is a fundamental tenet of good brand management that a brand has to be communicated coherently and consistently across all consumer touch points (points of contact between a brand and consumers). Consumers experience brands in so many different ways in everyday life beyond the tangible product offering itself—through the brand's stores, websites and online presence, through the people who represent and sell the brand, the customer service department, articles about the brand in the media and popular press, and word of mouth. As such, everything communicates a brand to the consumer—both contact points that are controlled by the brand (e.g. brand

websites, stores, employees), as well as contact points that are *not* controlled by the brand (e.g. media articles written by reporters, friends, word of mouth opinions).[61] I wrote about this as far back as 1997 in my Harvard Business Review article "Building Brands without Mass Media."

56. I have in my book *Hidden in Plain Sight* described how in order to succeed with customers, brands need to manage all their various points of communication and interfaces with customers, to connect and engage with them by finding customers "where they are" and being part of their lives through the everyday experiences that consumers have with the brand. A brand can spend millions of dollars on advertising, and yet the brand's name can mean nothing to consumers. A brand is, instead, created out of everyday consumer contact and the experiences that customers have with it. Successful brands commit to constantly improving and safeguarding the integrity and associative value of everything that surrounds the brand in all phases of development: where it is conceived, where it is made, where it is seen, and where it is sold.[62] Brand owners must leverage every opportunity available to control and project the brand story.

57. Within the world of retailing, executives have an even larger responsibility to present the retail

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[61] Bedbury, Scott, A New Brand World, Penguin Books, New York, NY 2002, Chapter 5

[62] Ibid, p. 111

brand in the best possible light through the retail stores. This comprises a whole host of disparate consumer touchpoints—visual imagery, décor and displays in the store, apparel labels and hangs tags, even the shopping bags that consumers carry out of the store. In my book *Brand Leadership*, I describe how branded environments can provide a total functional and emotional experience, where the setting for the experience and the sensory cues all help to create and reinforce the brand identity and brand associations.[63] The shopping experience itself has become an advertising vehicle as it is an opportunity for the consumers to experience the brand first hand while making purchase decisions there and then.

58. Take the example of Nike. Through its flagship Niketown stores, Nike aimed to create positive brand associations and strong brand-consumer relationships. The primary purpose of Niketown was not profits per se, but rather, to create a powerful and complete "Nike experience" so that it would stimulate purchases of Nike products at *other* retail channels. Hence the experiential displays of past iconic Nike shoe models, *Sports Illustrated* magazine covers featuring athletes wearing Nike, actual half-court basketball floors, and video clips of athletes in Niketowns.[64]

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[63] Aaker, David and Erich Joachimsthaler, Brand Leadership, The Free Press, New York, NY, 2000, Chapter 9: Building Brands—Beyond Media Advertising

[64] Pine and Gilmore, pp 63

59. These various principles that I have described above are important for brands generally, and even more important in the teen market. Given teens' attitudes toward brands, all consumer touchpoints must be completely aligned and consistent with a brand's identity, in order for the brand to appear authentic to the discerning and critical teenager. For teen apparel retailers, the shopping environment provides a perfect, controllable environment to communicate the complete brand identity in a holistic and highly experiential way.

> Brands that are themselves retailers—Abercrombie & Fitch, American Eagle, Old Navy, Gap, and others—benefit from having total control of their retail environment. From the displays to the full realm of merchandise to the store aesthetic (layout, lighting, music, signage and sales clerks), these retail brands are able to craft the environment to complement, enhance, and convey their brand message and overriding identity.[65]

60. Since inception, ANF's primary business and marketing strategy has been to focus on building the brand through delivering a highly sensory retail experience to target customers with minimal advertising, creating peer acceptance and fostering word-of-mouth brand promotion within

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[65] Zollo, Peter, Getting Wiser to Teens: More insights into marketing to teenagers, New Strategist Publications, Ithaca, NY, 2004, p 333

each target segment. Various ANF's executives, and even its Annual Report, have confirmed the extreme importance of the retail store experience.

61. As part of its store-focused business strategy, ANF has developed standards for every aspect of the customer experience to ensure the brand's image is evident to consumers the minute the step into a store: through product presentation, marketing imagery, music and lighting, fragrance, and enthusiastic and energetic brand representatives, with continuous reinvestment in store refreshes and remodels.[66]

62. According to ANF executives, the goal of the shopping experience for ANF's brands is to be "the best retail experience that its customers have ever experienced." The ANF stores are supposed to transplant shoppers from a generic mall and bring them right into a Prep School hangout (abercrombie), a surf hangout with imagery of the Huntington Beach Pier (Hollister), or a private club (Abercrombie & Fitch).

63. I have visited Abercrombie & Fitch, abercrombie and Hollister stores. I have reviewed the materials and spoken to ANF executives mentioned in the front of my report. From what I have seen, every aspect of ANF brands' stores are highly consistent and deliberately executed to

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[66] Abercrombie & Fitch Annual Report, 2007, p. 6, abercrombie Employee Interviews, April 23 and May 4, 2009

evoke each brand's identity—from the music played and sold there, to the live TV feed of SoCal beaches in Hollister stores, the athletic and lifestyle props used in Abercrombie stores, and the related lifestyle magazines artfully displayed around the stores. According to ANF executives, even the in-store music varies from brand to brand, based on each brands identity. Abercrombie stores play pop music and Top 40 hits; Hollister stores play Garage and SoCal-styled music; Abercrombie & Fitch stores play dance music.[67] In addition, ANF fragrances are sprayed heavily throughout the store, so that consumers can smell it on the clothes they purchase and bring home—part of a deliberate strategy so that consumers remember their in- store experience after they have left the store and are enjoying their purchases at home.

64. The Abercrombie & Fitch store experience is widely recognized and acclaimed. From numerous data points ANF is a clear market leader in creating one of the best in-store retail experiences. In a *Journal of Marketing* article measuring successful brand experiences, the Abercrombie & Fitch stores ranked among the best brands, among such renowned experiential brands as W Hotels, the Apple Store, and Star-

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[67] Interviews with Sunny Traub and Brandon Tonniges, May 4, 2009

bucks.[68] The same experience is carried over to the abercrombie stores albeit with minor differences. Even on Wikipedia—the publicly-editable encyclopedia website—the reference for abercrombie states:

> "Abercrombie stores are designed to give off a "classic cool" effect. They are designed as "canoe stores," displaying a similar floor layout as Abercrombie & Fitch's (the retail space is divided into multiple rooms). However, the kids prototype does bear differences. It has no louvers to cover the windows, has brighter lighting, is smaller in retail space, blasts electronic dance music and pop music from young artists, and displays marketing pictures with young models resembling those at A&F. The signature fragrance, "Phelps", is sprayed store-wide."[69]

65. ANF's expertise and great success in creating the ultimate brand experience across all their portfolio brand stores has even been acknowledge by a *competitor* Quiksilver when describing what ANF did with Hollister:

> "They get an A in the romance," says Quiksilver's Executive Vice President of Strategic Brand Development Tom Holbrook, who re-

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[68] Brakus, Josko J., Bernd H. Schmitt, and Lia Zarantonello, Brand Experience: What is it? How is it Measured? Does it Affect Loyalty?, *Journal of Marketing* p 5-6, May 1, 2009

[69] http://en.wikipedia.org/wiki/Abercrombie_kids

cently returned from a retail tour in the Midwest. "I heard people outside the store asking if it was a restaurant. It doesn't look like a typical store, and when you walk into a store everything is controlled—the smell, the lighting, the look of the kids that are working there. They've packaged the environment better than anybody, and I think that's a lesson that a lot of people have learned ever since they launched."[70]

(d) ANF Brand Management Structure and Processes

66. In this sub-section, I describe how various organizational structures and management processes, including the Abercrombie Look Policy, are absolutely critical in ensuring that Abercrombie's carefully-crafted brand identity and sensory in- store brand experience is maintained consistently across its retail stores.

67. In my book *Brand Leadership* as well as research that led to the book, I describe the various organizational structures that create responsibilities and accountabilities for managing the brand.[71] Having proper processes is extremely important in ANF's competitive retail market. At ANF and abercrombie, brand management

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[70] Hunter, Josh, *How* Hollister Co. Stole Surf: Eight Years After Abercrombie & Fitch Invaded The Surf Market, What Can be Done To Defend Against Them?, TransworldBusiness, August 7, 2008.

[71] David A. Aaker and Erich Joachimsthaler, The Lure of Global Branding, *Harvard Business Review*, November/December 1999.

efforts are cooperatively led by the Design, Stores, Merchandising, and Human Resources teams. From my executive interviews, I understand that the ANF brand management system is standardized, managed and conveyed internally through a number of different guidelines, programs and policies. These include, for example: weekly manager meetings, the Human Resources Daily Program, Associate Handbook, Appearance/Look Policy, Employee Training Materials, Manager-in-Training Program, "Today at Abercrombie" newsletter, and Store Floorset documents, just to name a few.[72] Collectively, these specify how ANF brands should be represented; they facilitate and support the retail store experience and brand portrayal in a visually and experientially consistent and positive manner.

68. Because retail plays an oversized role in ANF's business strategy and influencing consumers' perceptions and purchase decisions, there is an extremely well-developed system of managing the abercrombie in-store retail experience. ANF meticulously controls and ensures that each and every in-store experience is consistent and standardized, right down to the brightness of the lighting, the decibel level of the music played, the way merchandise is displayed, how employees look and behave, even the taglines

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[72] Passalacqua, Jessi and Deon Riley, Employee Interviews, April 23, 2009

that employees use to greet customers. The desired store experience is created at corporate headquarters by the company's Brand Senses team, and then rolled out nationwide. All store experiences are managed and continually evaluated based on the ANF "six senses"—sight, sound, smell, energy, touch, and taste:

> We [Abercrombie & Fitch Stores, Inc.] have six senses; Sight, Sound, Smell, Touch, Taste and Energy. From the first moment a customer enters the store they are transported into an atmosphere that looks and feels completely authentic to each brand. The up-beat sound of the latest music lends to a lively mood while our signature fragrance fills the air. From our incredibly soft fabrics to our delicious lip glosses—everything combines to create a unique one-of-a-kind energy.[73]

69. To make sure all stores are consistent and aligned with the desired brand experience, ANF issues a "Program" every day that is generated by headquarters and disseminated to all ANF store managers across the country. The Program details any updates, reminders, or policies that need to be implemented or enhanced at stores that particular day. This could include information on a change of store music, a new customer greeting tagline, or a reminder about

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[73] Abercrombie & Fitch Stores Inc. Career Opportunities Booklet, p 18

the Look Policy.[74] Details of each day's Program are disseminated by store managers to all store employees.[75] Store managers are instructed to conduct regular, hourly audits based on the ANF "six senses." The "Floor Supervisor Survival Guide: Store Experience Snapshot" lists criteria as follows:[76]

> **Energy:** Beautiful and handsome faces that are engaging, smiling, energetic, happy people
>
> **Sight:** Floorset, details, lighting, marketing, forms, rightsizing
>
> **Smell:** Iconic scent spritzed every 1/3 hour, 3 pumps, and 6" from the merchandise, forms and rugs
>
> **Sound:** Iconic music must be set on *high* to create a fun, optimistic environment
>
> **Touch:** Our standard is to have the softest feeling merchandise

70. Also, ANF has put in place a *Secret Shopper* brand and retail experience evaluation program in which shopping 'spies' are sent out into stores twice a month to assess the stores' compliance with and performance in creating the desired brand experience. Stores are reviewed and measured against specific metrics, to assess if

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[74] Passalacqua, Jessi and Deon Riley, Employee Interviews, April 23, 2009

[75] Ibid, April 23, 2009

[76] "Floor Supervisor Survival Guide", A&F000762

they meet standards and are complying with all guidelines (e.g. employees using the standard tagline issued, appearing on-brand, having the music on at the right level, etc.). Results are delivered weekly to all Store Directors and Regional Managers. The managers whose stores perform in the bottom 10% of the assessment are required to participate on a conference call with the corporate office and work on improving their overall evaluation.[77]

71. On the basis of my analyses, I conclude that ANF has put in place critical key processes, systems, policies and guidelines that are absolutely necessary to execute the abercrombie brand experience optimally and consistently across all its stores. More than that, these processes and policies are absolutely critical for abercrombie to convey the right associations and compete effectively for the attention of its tween target audience.

(e) The Integral Role of ANF's and Abercrombie Store Employees

72. In this section, I describe the role and particular importance of ANF's store employees in representing and conveying the ANF brands (including abercrombie), and enhancing the in-store experience for ANF's customers.

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[77] Information on the Secret Shopper program comes from the interview with Jessi Passalacqua on April 23, 2009

73. In the retail environment, many purchasing decisions are made, or can be heavily influenced, while consumers are on the floor of the store itself. Shoppers are susceptible to impressions and information they acquire while in stores. In fact, shopping research has shown that the longer a shopper remains in a store, the more he or she is likely to buy. And, the amount of time a shopper spends in a store depends on how comfortable and enjoyable the experience is.[78]

74. Retail shopping, especially for teens, comprises much more than the actual goal of buying something. For them, shopping a means of interacting and socializing with their friends, and forming relationship bonds through hanging out and browsing through store racks. While teens are in a store with their friends, it is vital for the retailer to make a strong impact on them, to create that "holy grail" of brand and peer acceptance among teens, as well as differentiating itself from mall neighbors as well as other category competitors. Retailers do this by creating a multi-sensory experience that is attractive to teens, through the store's look and feel, its employees, and its overall atmosphere.

75. In any retail setting, *employees* are a crucial component in communicating the brand experience because they are the personification of the brand. In fact, "employees are the conduit

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[78] Underhill, Paco, Underhill, Paco, Why We Buy: The Science of Shopping, New York, NY, Simon & Schuster, 1999, p. 33

through which all careful product design, manufacturing, packaging and processes are finally delivered to customers; they are the means to bring the brand alive."[79] Because the employees in the retail environment are the most obvious personal contact consumers have with the brand, everything they do, say, and wear communicates the brand, whether it is through appearance or behavior. Thus, the look and behavior of the retail employees both need to be tightly controlled so as to ensure they accurately represent and embody the brand.

76. In particular, clothes and attire send the most visible cues to customers to help them identify messages consistent with a brand and its desired experience. It is widespread practice for retailers to lay down a dress code or look policy for their employees so that they look aligned with the brand and product offering. For example, Banana Republic employees express its "classic casual chic" brand positioning and product offering through their smart casual chic dress appearance. On the other end of the spectrum, TopShop's style advisors express the eclectic, cutting edge TopShop brand image through their 'exuberant sense of personal style."[80] Similarly, Nordstrom's sales people dress according to the

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[79] Clifton and Simmons, Brands and Branding: The Economist Series, Chapter 6: Brand Experience, by Shaun Smith, 2004

[80] Wilson, Eric, "Trust Me. You'll Look Cool In It." *New York Times* Fashion & Style Section, April 9, 2009

style of the department that they represent—suit salesmen wear classic business formalwear, while salesmen in the young men's fashions are more casually dressed in jeans.

77. Because the ANF brands' identities each embody a specific concept (e.g. Abercrombie's New England preppy cool or Hollister's Southern California beach/surf lifestyle) with a specific set of associations and brand cues, it is even more important for employees to look the part. Store employees are an important way for consumers to experience the look, attitude, and personality of the brand.

78. Since tween and teen purchases are heavily influenced by peers whom they admire and think are cool, it is important for retail store employees to act as those aspirational cool peers. According to the Human Resource department at ANF. there is a reason why in-store employees are not called sales associates and instead, called "Models." They are supposed to embody the ANF brand values of All-American optimism, with active, fun, outgoing and engaging personalities, while also being driven and successful.[81] Their role in stores is to greet customers, make them feel welcome and comfortable, model the ANF brand's style of clothing and its particular "look", act as aspirational role models, and engender positive feelings toward the brand.

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[81] Passalacqua, Jessi and Deon Riley, Employee Interviews, April 23, 2009

They are Brand Ambassadors in the truest sense —a verbal, visual and human experience of the Abercrombie brand and its embodiment of rugged casual all-American prep. Importantly, these Models do not have individual sales quotas, further underscoring the fact that the Model's primary role is to personify the abercrombie brand rather than pushing sales and earning sales commissions. This stands in stark contrast to most other retail brands' store employees who work based on sales commission.

79. That Models are a physical representation of the brand is evident to any aspiring applicant and indeed, to the public at large. On the publicly-accessible Abercrombie & Fitch Careers website, it is stated very evidently:[82]

> "Models protect and project the image of the brand through personal style, providing customer service and maintaining presentation standards.
>
> **WHAT YOU NEED TO BRING TO THE JOB:**
>
> Sophistication, aspiration, sense of style, diversity awareness, integrity, applied learning, outgoing personality and communication skills.

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[82] http://www.abercrombie.com/anf/careers/model.html, accessed on December 8, 2010

SKILLS YOU WILL DEVELOP ON THE JOB:

Passion for the brand, multi-tasking, adaptability/flexibility, attention to detail, product knowledge and customer focus."

80. As physical brand ambassadors in the retail environment, Abercrombie's store employees/Models have an additional important role in framing or anchoring the brand for consumers. Framing occurs when a person or object exemplifies specific brand cues and creates either a positive or negative frame against which all other cues are processed. Anchoring is a cognitive bias that causes consumers to rely more heavily on a particular single dominant cue as an "anchor." Consumers will arrive at an initial judgment (e.g. a judgment of an in-store employee who greets you), and then make adjustments of their first impressions based on additional information.[83] Given teens' psychological disposition to look to specific role models and cues, the role of the employee is all the more important so that Abercrombie can ensure that their customers have a strong and favorable impression of the brand.[84]

81. For all these reasons, in order to execute, manage, and standardize the brand experience for its thousands of retail employees, the Abercrombie

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[83] Kotler, Philip, and Kevin Lane Keller, Marketing Management, 13th Edition, PHI, pG1

[84] Ibid, p. 176

Appearance/Look Policy is detailed and specific, covering all aspects of employees' appearance and behavior. The Abercrombie & Fitch Store Associate Handbook states:

> When people think of Abercrombie & Fitch, they think of lifestyle clothing with great attitude, a comfortable fit, and the best quality. As an associate of Abercrombie & Fitch, you should always strive to project a professional image that is consistent with our reputation as the best in the fashion industry. We realize that your manner of dress and grooming habits are highly personal and subject to your own tastes and preferences. We wish to respect your individuality and still maintain a consistent level of dress and grooming that represents what people expect from Abercrombie & Fitch.[85]

82. In the Appearance/Look Policy, ANF makes it clear the objective of its retail employees in reinforcing the brand's identity, representing its natural, classic all-American style. The Look Policy clearly states that clothing and footwear style should be similar to the Abercrombie & Fitch brand, and that "**All clothing and footwear**

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[85] Abercrombie & Fitch Appearance/Look Policy, Associate Handbook, p 29-30

choices should reflect what a customer would see when they think about the Abercrombie brand."[86]

83. To further ensure brand alignment, the Look Policy Guidelines are also highly prescriptive across many dimensions, covering do's and don'ts for hairstyles, makeup, fingernails, facial hair, clothing and footwear, jewelry, tattoos and caps. Men are not allowed to wear earrings. Women are not allowed to wear more than two earrings on each ear. Even though A&F has a gym clothing line, no gym shorts are allowed as clothing worn at work should not be too informal. Likewise, even though A&F sells caps, they are considered too informal for the image ANF wants to project, and are not allowed to be worn on the sales floor.[87] My understanding from my conversation with ANF's Director of Stores, Midwest is that this policy extends beyond caps to apply to all headgear.

84. In addition, there is also the weekly "HR 411" which reminds all in-store managers about HR policies, including the essential aspects of the brand in order to create a consistent and standard Abercrombie experience. This includes information on the Look Policy, Style Consistency, and hiring tips. On top of this, the weekly "Today at Abercrombie" newsletter is issued to keep

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[86] Abercrombie & Fitch Appearance/Look Policy, Associate Handbook, p 29 and 30, A&F000053-54

[87] Abercrombie & Fitch Appearance/Look Policy, Associate Handbook, p 29 and 30, A&F000053-54

the Models updated on the specifics of their role as a brand representative. For example, they are given the newest tagline on what specifically each employee should say when greeting a customer, what product they are talking about that week, and how to style their clothes with corresponding instructional photos.[88]

85. The importance of store employees for Abercrombie cannot be overstated. It is precisely because of their critical importance that detailed guidelines and policies on employees' appearance and behavior are vital. Even the *Journal of Integrated Communications* has taken note of, and commended this: "Abercrombie and Fitch highly regulate the appearance of their stores, advertising and even the physical appearance of store employees every customer who enters an Abercrombie & Fitch store can feel the Abercrombie & Fitch style from the store layout to the cashier."[89]

The Negative Impact of a Store Employee Wearing Inappropriate Attire

86. In this section, I will present my analysis of the negative effect that a violation of the Look Poli-

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[88] Multiple *Today at Abercrombie and Today at abercrombie* newsletters, A&F000785-839

[89] Jung, Kacie Lynne and Matthew Merlin, Lifestyle Branding: As More Companies Embrace it, Consumer Opposition Grows, *Journal of Integrated Communications*, 2002-2003, p 41-42

cy, such as wearing of inappropriate attire by a store employee, has on the Abercrombie brand.

87. As I have described, the Abercrombie brand identity is communicated powerfully and holistically through its store experience. Given that they convey the New England prep school/Ivy League "preppy cool" lifestyle and subculture, the brands must be conveyed in a multi-dimensional *and* highly consistent manner. In order to be credible, ANF needs to ensure a flawless, 360 degree execution of the brand. The brand must "walk the walk" and not just "talk the talk"

88. Studies have shown that one of the most important factors that affect a brand's associations is the consistency with which brand information is presented to consumers.[90] This consistency is critical to maintaining the strength and favorability of brand associations. If consumers receive mixed messaging from a brand, e.g., conflicting portrayals of a brand's positioning, they will become confused as to the true essence and value of that brand. Mixed messaging regarding a brand's positioning will impact consumer confidence when evaluating the brand, which

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[90] Kevin L. Keller, Strategic Brand Management: Building, Measuring, and Managing Brand Equity (Prentice Hall, 2007).

may lead consumers to abandon the brand altogether.[91]

89. The Abercrombie & Fitch and abercrombie brand experience comprises a holistic, 'gestalt' of different components—from the preppy and vintage look and feel of the clothes displayed, the black-and-white photography and stylized displays with use of props such as athletic equipment (hockey sticks, boxing gloves, soccer balls) and moosehead taxidermy,[92] the type of music played, to the appearance and behavior of its store employees/Models. Each component of the entire brand experience is important and critical, and works together as a carefully managed 'family' of components that collectively drive toward conveying the New England prep school/Ivy League lifestyle in the most coherent and authentic way possible. Conveying the brand in a cohesive manner aids the encoding of new information into memory and its retrieval and strengthens the development of the brand image in consumers' minds.[93] This is why brands work so hard to be consistent and "authentic" to teens. Take for example, the Air-

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[91] Lefa Teng and Michael Laroche, Building and Testing Models of Consumer Price Intention in Competitive and Multicultural Environments, *Journal of Business Research*, March 2007.

[92] abercrombie floorset instructions, Spring Break 2008, A&F001080

[93] John R. Anderson, *The Architecture of Cognition*, Cambridge, MA: Harvard University Press, 1983.

walk brand of youth-oriented board shoes. It has worked tirelessly to appear authentic to teens by sponsoring and associating itself the best athletes in its category, such as superstar skateboarder Tony Hawk and Winter X Games snowboarding gold medalist Lindsey Jacobellis.

90. Against this scenario, even an aberration of a single component, particularly one that is as obvious and visible as an employee's physical appearance through his/her attire, can distort the desired brand effect and consumer perceptions. This aberration causes a breakdown in the synergy of the in-store experience components. It weakens the associations of the other components and brand cues, disrupting the carefully thought-through effect that ANF has worked hard to achieve. According to the psychological decision making bias, the availability heuristic, consumers base their predications of items or brands on the quickness and ease with which a particular example of an outcome comes to mind. A standout, off-brand experience that comes to mind quickly can overestimate the likelihood of its happening again and again in the mind of the consumer; it may lead a consumer to inflate the likelihood of a future negative, off-brand experience occurring.[94]

91. An inconsistent or negative in-store brand experience can cause adverse damage to a brand and

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[94] Kotler, Philip, and Kevin Lane Keller, Marketing Management, 13th Edition, PHI, p 175

its sales. As data indicates, there is a direct relationship between purchase rates and the satisfaction rating of a retailer, indicating that negative experiences are a key cause of lost sales—10% to 30% plus future lost sales due to shoppers switching retailers.[95] Negative experiences could be anything ranging from an encounter with an unfriendly store employee, to out-of-stock merchandise. In fact, data also suggests that these negative experiences impact not only the customer who experienced it, but also the customers circle of friends and family with whom they are likely to spread their negative experiences.[96]

92. A store employee's incorrect portrayal of the brand—be it through his/her attitude or the wearing of an inappropriate clothing style, footwear, headgear or jewelry not representative of the brand—can have a negative impact on the brand because he/she is viewed by thousands of people in a given week. Take for example, the Woodland Hills Mall abercrombie store in Tulsa, Oklahoma—on any given week, a Model could incorrectly portray the brand to hundreds of in-store customers.[97] These customers could go on

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[95] Lucas, James, The Critical Shopping Experience; The Retail Tragedy: Frankel Examines Why Shoppers Switch, *Journal of Marketing Management*, Volume 8, No 1, Spring 1999, p. 60

[96] Ibid, p. 60

[97] Store data for the Woodland Hills Mall store in Tulsa, OK from 2008: 604 average transactions per week.

to spread the message to their thousands of friends and the negative impact on the brand is compounded.

93. In addition to the potential damage in customer perceptions, any violation of Abercrombie & Fitch Look Policy may cause confusion among other ANF employees, resulting in a breakdown of a highly-controlled brand management system. In the case of *Cloutier v. Costco Wholesale Corp.* where an employee violated Costco's look policy by wearing facial jewelry, it was determined that Costco was within its rights to establish a "no facial jewelry" policy because "it would result in the company's losing ability to control how it projects its image to the public and, further that 'the company had a legitimate interest in maintaining a professional image."[98] At abercrombie, one exemption from the Look Policy could result in a breakdown in ANF's control over the in-store brand experience, one that is critically important to maintaining the legitimacy of the brand's identity and image.

94. The abercrombie brand identity is founded upon its sibling Abercrombie & Fitch brand, which has been built as the epitome of an aspirational, all-American cool brand for youth and teens. This is reflected not only in ANF's internal objectives

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[98] King, George G., Jeffrey D. Winchester, You (Don't) Look Marvelous: Considerations for Employers Regulating Employee Appearance, Cornell Hotel and Restaurant Administration Quarterly, November 2006, p. 365

and its highly controlled brand management practices, but also reflected in actual teen perceptions of the brand-Abercrombie & Fitch ranks amongst the top teen preferred clothing brands.[99]

95. ANF has defined a set of parameters and guidelines for what it believes to represent all-American New England prep school cool and what it takes to portray this aspirational lifestyle—through the specific "looks" portrayed in its brand imagery and websites. Clothing, footwear, headgear and overall appearances that do not fit, or are not similar to Abercrombie & Fitch look are not within the accepted definition of what constitutes the ANF-prescribed version of New England prep school/Ivy League cool and portray an inconsistent image of the brand.

96. Abercrombie & Fitch and abercrombie has consistently offered certain styles of their clothes across certain core apparel categories (i.e. polo shirts, t-shirts, sweaters, jeans, hoodies, etc.). There may be color and trim variations from year to year, but overall, there is a defined set of clothing styles that represent "the Abercrombie look." These established apparel categories and styles serve as immediately recognizable cues for the Abercrombie brand, so that tweens and teens are able to associate these items of

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[99] Piper Jaffray "Taking Stock with Teens" Semi-Annual Survey, 2008, see http://www.piperjaffray.com/1col.aspx?id=287&releaseid=1127632

clothing and styles with the brand, even outside of Abercrombie & Fitch and abercrombie stores.

97. As noted above, an ANF Models primary job duty is to "model" the ANF brand. ANF's Look Policy prohibits facial hair, provocative clothing, the wearing of headwear (be it caps, hats or headscarves), and excessive jewelry because they will detract from the Abercrombie brand identity, and distract consumers thereby detracting from the brand.

98. While Abercrombie and abercrombie sell scarves, my review of the scarves offered on the brand websites and in their employee style guides indicate that these scarves are clearly of the kind meant to be worn around the neck, and not as headscarves. The Abercrombie styling guides I reviewed show clearly various outfits and looks to be worn by associates and Models, and these show how scarves should be worn by store employees. These instructions show visually and describe verbally "style scarf loosely around neck (reference form scarf styling how to)" with step by step instructions on how to style them around the neck.[100] Any detraction from this is off-brand, in the same way that any other Abercrombie-offered clothing item could be misappropriated and worn in a manner contrary to the style guide would be similarly off brand, e.g. Abercrombie clothes worn two sizes

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[100] Associate Styling Guide—Female A&F000721-725, and styling images and instructions from A&F000763-765

too small and therefore overly tight-fitting and provocative. A scarf worn around the head would never be associated with the Abercrombie brand nor "the Abercrombie look." In the same vein, if a Model were to wear formal lace-up shoes, a suit and tie, a cocktail dress, or a cowboy hat while on the job, consumers would never associate those items with Abercrombie & Fitch. Any store employee or Model wearing these off-brand looks (be it a headscarf, suit, cocktail dress, etc.) would only cause confusion to Abercrombie consumers.

99. In sum, the appearance and attitude of retail employees is greatly important to the success of the Abercrombie brand. These employees play multiple important roles for Abercrombie. They are Abercrombie's human representation of New England prep school/Ivy League cool. They help to create relevance and meaning for the Abercrombie brand in target consumers' minds, they help to engender consumer affinity and engagement with the brand, they create word of mouth through talking value, and they help to build store traffic. Because Abercrombie is such an aspirational lifestyle and identity-driven brand that is based on a real-life subculture, its store employees, above all else, are one of the most important touchpoints in conveying the Abercrombie brand to customers. It is vital that every single store employee is able to consistently portray "the Abercrombie look" and brand identity in a credible and authentic way,

and to act as aspirational New England 'cool' role models for those tweens and teens.

My opinions and conclusions are based on the evidence I have examined as of the date of this report. I reserve the right to revise my report if more information becomes available.

Executed this 10th day of Jan., 2011

/s/ ERICH JOACHIMSTHALER
ERICH JOACHIMSTHALER

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 09-CV-602-GKF-FHM

IN THE MATTER OF THE ACCUSATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

ABERCROMBIE & FITCH STORES, INC., RESPONDENT

Dec. 10, 2010

DECLARATION OF KATHLEEN K. LUNDQUIST

I, KATHLEEN K. LUNDQUIST, declare and state as follows:

1. I am an Industrial Psychologist currently employed as President of APT*Metrics*, Inc. (APT), in Darien, Connecticut. My work experience over the past 25 years has been in the areas of Industrial Psychology and Psychometrics, focusing on the development, analysis, and validation of employee selection procedures. I have been a Fellow with the Psychological Corporation, a Summer Research Fellow with the Educational Testing Service (ETS), and a Research Associate with the National Academy of Sciences.

2. Throughout my professional career, I have extensively researched, designed, and conducted statistical analyses and provided consultation in the areas of job analysis, test validation, performance appraisal, and research design. I have performed consulting work in these areas for major corporations in the banking, financial services, retail, electronics, aerospace, pharmaceutical, telecommunications, and electric utility industries, as well as for federal, state, and local agencies and not-for-profit organizations.

3. I am licensed as a psychologist in the State of Connecticut. My qualifications are set forth in my curriculum vitae, which is attached to this report as Attachment A.

4. I have consulted with both plaintiffs' and defendants' counsel in employment discrimination cases and have testified as an expert witness in numerous such cases. I have served as an expert on selection procedure validation for both the U.S. Department of Labor and the U.S. Department of Justice, and have served as a member of the expert panel on assessment for the U.S. Department of Labor's National Skill Standards Board, chairing its Endorsement Review Panel.

5. I have also been selected to serve as a court-appointed expert to help carry out the provisions of consent decrees in employment discrimination class actions involving the FBI, Ford, Sodexo, Morgan Stanley, and Abercrombie & Fitch. I recently concluded work as a court-appointed expert in the Coca-Cola class action employment discrimination settlement,

assisting the external task force in reviewing the company's human resources practices, including the areas of job analysis and selection. A list of cases in which I have testified at trial or in deposition in the last four years is also contained in Attachment A.

6. I have been assisted in this work by Christina Norris-Watts, Ph.D., John R. Curtis, Ph.D., and Shana Simon Stukalsky, Ph.D., all Industrial Psychologists employed by APT*Metrics*. A list of professional references and documents reviewed in connection with this report are included in Attachment B.

EXECUTIVE SUMMARY

7. APT*Metrics* conducted a written job analysis and developed job-related criteria for all in-store positions under the terms of the settlement of *Gonzalez et al. v. Abercrombie & Fitch Stores, Inc.* in November 2004. This job analysis analyzed all store positions, resulted in written job descriptions, and served as a basis for developing and validating structured interviews. I have been asked to review the results of the job analysis and structured interview validation studies and to give expert opinion regarding the importance of: 1) the Appearance and Sense of Style competency, and 2) adherence to the Look Policy in the Model position.

8. The job analysis results for the Model job showed that representing the brand in one's appearance and sense of style is an essential function of the job. In other words, an essential function of the Model job is to act as a model for the brand. In so doing, Models are expected to represent the Aber-

crombie & Fitch and abercrombie brands ("Abercrombie") in their appearance and sense of style. Candidates for the Model position are selected in part on meeting the Appearance and Sense of Style requirement in the structured interview before they are hired into this position. Once hired, Models are trained on and required to adhere to the company Look Policy, which requires that they maintain their appearance in a manner that is consistent with the brand. Models are also expected to know and comply with company standards of conduct, including the Look Policy.

DESCRIPTION AND RESULTS OF THE JOB ANALYSIS FOR THE MODEL POSITION

9. In July 2005, APT*Metrics* completed a job analysis study of all in-store positions across brands, regions, and districts. The purpose of the job analysis study was to identify the work performed by employees in in-store positions, along with identifying the knowledge, skills, abilities, and other characteristics (competencies) required to perform the work. APT*Metrics* employed a multi-method job analytic approach that is consistent with relevant professional and legal standards (Equal Employment Opportunity Commission, *et al.*, 1978; Society for Industrial and Organizational Psychology, 2003; American Educational Research Association, *et al.*, 1999).

10. The job analysis study included:

- a review of documents and materials related to in-store jobs;

- site visits and interviews with incumbents and managers;
- meeting with job experts to discuss and finalize job analysis surveys;
- the administration of job analysis surveys to the population of managers, and
- the analysis of survey data.

11. The Model task and competencies surveys were sent to the population of Store Managers (N=794), of which 646 completed the survey, for a response rate of 81%. Store Managers rated Model tasks on how important that task is to the job and how frequently incumbents perform the task.

12. Of the 90 tasks on the Model survey, three are relevant to upholding or adhering to the Look Policy or other Abercrombie policies and procedures. Table 1 presents the results for these six tasks. A job task was determined to be either Important or Critical to the job based on mean importance ratings of 2.00-2.49, or 2.50 or greater, respectively. As can be seen in Table 1, job analysis participants rated all three tasks relevant to the Look Policy as critical. Further, the frequency ratings show that the relevant tasks are performed frequently. Specifically, the mean frequency ratings are all greater than 4.0, indicating that they are performed "Once or Twice A Day."

Table 1: Mean Task Importance and Frequency Ratings

Task Area	Task	Importance (0-3)	Frequency (1-5)
Represents the Brand	1. Adheres to Look Policy guidelines in personal appearance that reflects the Abercrombie lifestyle.	2.96 Critical	4.68 More than 2 times per day
Represents the Brand	2. Uploads and shares Abercrombie visions and standards.	2.86 Critical	4.67 More than 2 times per day
Represents the Brand	3. Creates a fun and engaging environment throughout the store.	2.96 Critical	4.90 More than 2 times per day

Importance Rating: 0 = "Not Performed", 1 = "Minor Importance", 2 = "Important", 3 = "Critical"
Frequency Rating: 1 = "Less Than Once a Month", 2 = "Monthly", 3 = "Weekly", 4 = "Once or Twice A Day", 5 ="More than Twice A Day"

13. Store Managers also rated competencies for the Model job. They provided two ratings: how important the competency is for the job and whether or not the competency is required upon entry into the job. Of the 55 competencies in the job analysis survey, six are particularly relevant to the Appearance and Sense of Style standard and the Look Policy. Table 2 presents the results for these six competencies. A competency was determined to be either Important or Critical based on a mean importance rating of 2.00-2.49, or 2.50 or greater, respectively. In addition, a mean entry requirement rating of .67 or greater indicates a competency is requisite to the job prior to hire. As can be seen in Table 2, job analysis participants rated all six competencies as critical. Five of the competencies were rated as required at time of hire; one was deemed to be learned on the job.

Table 2: Mean Competency Importance and Required Upon Entry Ratings

Competency Area	Competency	IMPORTANCE (0-3)		REQUIRED UPON ENTRY (0,1)	
Fashion Style	1. Appearance: Ability to present oneself attractively, appear well groomed,	2.87	Critical	0.96	Yes

	and wear attractive, stylish, fashionable clothes, hairstyle, and accessories that are consistent with the Abercrombie brand. This includes having personal attractiveness that positively fits Abercrombie brand and exhibits personal appeal.				
Fashion Style	2. Passion for the Brand: The willingness to embrace and perpe-	2.77	Critical	0.72	Yes

	tuate passion for the Brand, including showing enthusiasm for the Brand and taking pride in the store.				
Fashion Style	3. Aspiration to Succeed: The ability to learn, accept, proactively encourage, and promote the company's mission, values, standards, and culture among customers, co-workers, and management.	2.57	Critical	0.69	Yes

Sales Skills	4. Influence Aspiration: The ability to influence customers' aspiration to dress in Abercrombie brand clothing. This includes wearing clothes that fit the brand and setting the example of the brand lifestyle.	2.75	Critical	0.69	Yes
Policies and Procedures	5. Conduct: Knowledge of and willingness to comply with Abercrombie standards of conduct (e.g., appearance	2.87	Critical	0.72	Yes

	policy, no fraternization policy, smoking and drug policies).				
Policies and Procedures	6. Compliance: Knowledge of federal, state, and local regulations, and Abercrombie policies and procedures (e.g., loss prevention policy, discrimination policy, harassment and respect policies).	2.77	Critical	0.58	No

Importance Rating: 0 ="Not Important", 1 ="Minor Importance", 2 ="Important", 3 ="Critical"

Required Upon Entry Rating: 0 ="Not Required At Time of Hire/Entry Into Job", 1 ="Required At Time of Hire/Entry Into Job"

14. It is clear from Table 1 that representing the brand is a critical part of the Model job. Representing the brand involves following the Look Policy; including proper dress, as defined by Abercrombie. In addition, Table 2 indicates that fashion style is a critical competency for Models. Abercrombie defines fashion style as appearance that "positively fits [the] Abercrombie brand"; having passion for the brand; and encouraging co-workers and customers to promote the "company's mission, values, standards, and culture" Also important to the Model job is to influence the aspiration of customers to dress in Abercrombie brand clothing, which involves "wearing clothes that fit the brand and setting the example of the brand lifestyle" Clearly, an important part of this job is not just selling Abercrombie clothes, but acting as a model for the Abercrombie style.

15. Based on the results of the job anlaysis, compliance with all Abercrombie policies, including the Look Policy, is critical for the job. Excerpts from the 2006 Look Policy are presented below:

> As an associate of Abercrombie & Fitch, you should always strive to project a professional image that is consistent with our reputation as the best in the fashion industry.
>
> We realize that your manner of dress and grooming habits are highly personal and subject to your own tastes and preferences. We wish to respect your individuality and still maintain a consistent level of dress and grooming that represents what people expect from Abercrombie & Fitch.

Expectations of all associates: Represent the Abercrombie & Fitch brand with natural classic American style.

Clothing and Footwear: Clothing and footwear style should be similar to the Abercrombie & Fitch brand. Clothing should also be consistent with the season Clothing worn at work should not be too informal (e.g., no gym shorts). Clothing choices should not be provocative (e.g., tanks should be worn with an undergarment. All clothing and footwear choices should reflect what a customer would expect to see when they think about the Abercrombie brand.

Caps: Caps are not allowed to be worn on the sales floor.

Compliance: Every associate and Management Team Member is responsible for following the A&F Look Policy All A&F associates and Managers are covered by the policy. Associates who do not met the A&F guidelines, will be informed of the specific areas(s) of non-compliance and told that the guidelines must be met immediately. Appropriate disciplinary action will be taken to ensure compliance with the policy, up to and including termination of employment.

16. In other words, wearing clothes that fit the Abercrombie brand is critical for the Model position. Determining the specific clothing that fits the Abercrombie brand, and the clothing that does not fit the Abercrombie brand, is up to the discretion of Abercrombie.

STRUCTURED INTERVIEW VALIDATION RESULTS FOR THE MODEL POSITION

17. Based on the results of the job analysis, APT*Metrics* developed and validated structured interviews. We identified key competencies that are important and required at time of hire for the Model position, and combined similar competencies into broader interview competencies.

18. Development of the structured interviews for the Model position included developing Lead and Probe questions, as well as behaviorally anchored rating scales (BARS) for each interview competency. Rating scales provide interviewers with the ability to distinguish different levels of performance in a reliable, structured, and quantitative manner, increasing the consistency and accuracy of the ratings made. APT*Metrics* developed evaluation standards for the *Outstanding, Meets Expectations*, and *Unacceptable* points on the rating scale to calibrate interviewers' ratings of candidate responses and to help ensure that interviewers were using rating scales consistently.

19. APT*Metrics* then validated the structured interviews using a content validation approach. To obtain content validation evidence for the structured interviews, APT*Metrics* consultants facilitated focus groups with job experts who had thorough knowledge of the store positions. Job experts reviewed both the questions and the evaluation standards for job relevance and clarity, and refined them as necessary.

20. One of the competencies validated for the Model position is the Appearance and Sense of Style competency. This competency is defined as:

> The ability to present oneself attractively, appear well groomed, and wear attractive, stylish, fashionable clothes and hairstyle, make-up, and accessories that are consistent with the Abercrombie brand. This includes having personal attractiveness that exhibits personal appeal and wearing clothes that fit the brand and setting the example of the brand lifestyle.

21. Table 3 presents the Appearance and Sense of Style Competency evaluation standards.

Table 3: Behavioral Standards for the Appearance and Sense of Style Competency

Behavioral Standard	Performance Level
A. Has exceptional personal attractiveness that is classic, natural, diverse	Outstanding
B. Spends time and effort into presenting oneself attractively and is impeccably well groomed	Outstanding
C. Wears exceptionally attractive, stylish, fashionable clothes and hairstyle, make-up, and accessories that enhance the	Outstanding

Abercrombie brand and brand lifestyle	
D. Had personal attractiveness that is classic, natural, diverse	Meets
E. Is well groomed	Meets
F Wears attractive, stylish, fashionable clothes and hairstyle, make-up, and accessories that are consistent with the Abercrombie brand	Meets
G. Personal attractiveness is below expectations, is not classic, natural, diverse	Below
H. Is unkempt or not well groomed, and does not seem to care about own appearance	Below
I. Does not wear attractive, stylish, fashionable clothes and hairstyle, make-up, and accessories; or wears clothes that are inconsistent with the Abercrombie brand	Below

22. As part of the interview validation, job experts assessed the extent to which each interview competency linked to the eight task areas identified in the job analysis. This linkage ensures that the competencies relate to the tasks performed in the Model job. Linkages indicated that Appearance and Sense of Style relates to "Represents the Brand" tasks as well as six additional task areas, including Customer Experience. This indicates that it is critical that Models maintain an appearance and sense of style that reflects and represents the Abercrombie brand. These data show that this competency is important for representing the Abercrombie brand, as well as enhancing the customers' shopping experience.

CONCLUSION

23. Results of the job analysis and the structured interview validation indicate that adhering to the Appearance and Sense of Style competency, as well as adhering to and upholding the Look Policy are important or critical to the Model job. The evidence is summarized below:

- Each task related to the Look Policy or other Abercrombie policies and procedures was rated as important or critical to the job;
- Each task related to the Look Policy or other Abercrombie policies and procedures was rated as frequently performed;
- Three job analysis competencies related to the Look Policy or other Abercrombie policies

and procedures were rated as important or critical to the job;

- Appearance and Sense of Style was validated and included in the final interview for the Model position;
- The evaluation standards for Appearance and Sense of Style were validated for the Model position; and
- Appearance and Sense of Style relates to important task areas for the Model position.

24. It is my opinion that it is both critical to the job and an essential function of the job of Model at Abercrombie to maintain an appearance and sense of style consistent with the brand. It is also my opinion that it is critical to the job of Model at Abercrombie to comply with standards of conduct including the Look Policy. Compliance with the Look Policy includes, but is not limited to, wearing clothing consistent with the Abercrombie brand. Task and competency evidence obtained in the job analysis and structured interview validation further supports the importance of the appearance and sense of style standard and adherence to the Look Policy for the Model position.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMPIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANTS

Feb. 22, 2011

DEPOSITION OF JOHN L. ESPOSITO

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[38]

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Q. So to kind of clarify or summarize what you just said, your view is that the Quaran does not require an hijab?

A. My interpretation as a scholar.

Q. As a scholar. There are other scholars who take a different view, they believe that the Quaran does require an hijab.

A. Both; other scholars and particularly Muslim religious scholars, many; but there are many who disagree with that interpretation.

* * * * *

[41]

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A. In Islam it began as a religious and cultural practice. The thing about the interaction between religion and culture is that religious traditions will take over a cultural practice; but when they take it over, it will then take on a religious motif. That clearly occurred with within Islam so that early on you had Muslim religious communities that clearly, in defining modesty, mandated some kind of veiling; and that continues today. That is in the case that we're discussing. And in many cases, we'll use the term "hijab" and then talk about a head scarf. The fact is that in some parts of the world what that means is that a woman will just cover her head, you know, by a piece of cloth, India and Pakistan. And for many, they do that because they see that as a religious prescription. For others, they see that as part of their culture, there is a cultural context. So you can—it really depends on the woman.

Q. So for some women veiling may be a religious practice. For others it may be a cultural practice?

A. Correct.

Q. And what you are saying is that you have to look at them on a case by case basis?

A. Exactly.

Q. You write in your report that veiling of women [42] did not become widespread in the Islamic empire until three or four generations after the death of Mohammed?

A. Correct.

Q. So, again, well, how did that—do you know how that occurred?

A. Not really. I mean, I know the phenomenon occurred, but no.

Q. And you've also written veiling was originally a sign of honor an distinction?

A. That's right.

Q. As opposed to now. What is it a sign of now?

A. Well, now it is a sign of—it could be multiple things. It is a sign of, clearly, modesty, religiosity; it is a sign of sending a signal. For example, in Egypt women have returned—in recent decades—returned to wearing the veil, the younger generation. For many of them it is an assertion of—there are multiple meanings—but some assertion of their modesty and particularly in public. In other words, vis-a-vis saying to the society and to men who might wish to grope them, etcetera, which is a phenomenon that exists among some Italians and some Egyptian. I am saying that as an Italian. What they are really saying is this is the kind of woman I am. And interestingly, the Quaran has the same modesty requirements that em-

phasize modesty for men. So when you, [43] for example, look at the way an Egyptian male might dress compared to a Saudi male, Saudi males will be completely covered, long arm sleeves, Egyptian men can be very devout and would be wearing an Izod or perhaps even an Abercrombie short sleeve shirt.

Q. And, again, that is a culture distinction?

A. Religious for some and cultural for others.

Q. How can it been religious for some and cultural for others?

A. Because people can engage in wearing something—and it really is, the question is, what is their motivation. In other words, particularly, I put it this way: When you live in a culture where most people engage in any practice that's commonly accepted, then most people will, for example, dress a certain way. Then the question that you have, if you really try to understand why, is, are they doing it primarily because it's religiously motivated, or for some of these people is it because this is the culture, this is the way people dress. A classic example is a group of Yemenite Jewish women who emigrated outside the country and they dress exactly as a Yemenite Muslim woman would including a face mask, even though it is not required in Judaism. In their case it is cultural. For a Yemenite Muslim woman, it's probably, she sees it as religious and cultural.

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[48]

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Q. And in fact all of the pictures of the hijab that are attached to your report could be consistent with Islam?

A. Yeah.

Q. And even if there was a picture of a woman not wearing a hijab, she could be consistent with Islam?

A. That's right.

Q. It's really a matter of interpretation?

A. It depends on—you are absolutely right. It's a matter of interpretation and often not completely—here we have great diversity in America because we have so many different people of different Muslim backgrounds. * * *

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[53]

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Q. Do some women wear the hijab as a source of nationalistic identity?

A. In countries where it's been like national dress, yes.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANTS

[Mar. 16, 2011]

DEPOSITION OF CHAD MOOREFIELD

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* * * * *

[5]

CHAD W. MOOREFIELD,

being by me first duly sworn, as hereinafter certified, deposes and says as follows:

EXAMINATION

BY MS. SEELY:

Q. Good morning, Mr. Moorfield.

A. Morning.

Q. My name is Barbara Seely, and I am an attorney for the Equal Employment Opportunity Commission. As you know, we are the plaintiffs in the case of EEOC versus Abercrombie & Fitch Stores, DBA Abercrombie Kids.

We've asked you to come here today for two reasons: First of all, you've been designated as a Rule 30(b)(6) deponent. And, secondly, we want to ask you some questions because we think you may have some information that's relevant to the case.

* * * * *

[138]

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Q. So is there something more important about the appearance competency than the other two competencies that were evaluated by the interviewer?

A. Yes.

Q. What is that?

A. Appearance and sense of style.

Q. Why, in your view—strike that.

Why, in your understanding, is the appearance competency given more weight in evaluating applicants?

A. I think that is—the model position is our advertising for our company. We don't do a lot of print. We don't do radio. We don't do television. We uphold a certain brand image that people come to expect, and we think the first part of our advertising, or the

show, as we would call it, would be that somebody would walk in and see a great-looking person with a sense of style in our store.

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[155]

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Q. What is it about caps that are too informal for the casual, informal brand that Abercrombie projects?

A. I would describe casual and classic as somebody that's more preppy versus sloppy. It would be a cap that would be a little bit—I just hopped out of bed and didn't take a shower, threw my hat on to go somewhere, threw on a big sweatshirt to go somewhere, versus somebody that had a sense of style that was casual, which wasn't trying to dress up, but was trying to have some style when they went out.

* * * * *

[156]

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Q. And at the time that this Look Policy was in effect, and I want to limit it now to June of 2008—June, July of 2008—were other kinds of headwear allowed under The Look Policy?

A. No.

[157]

Q. And why is that?

A. I mean, it would—I mean, we would consider it as distracting; so it's more about our clothes. It's not a product of ours, so we would want somebody to—if it's casual and classic, we would want somebody to notice that product that's representative of casual and classic.

Q. So you said that, "Any other kind of headwear wouldn't be a product of ours."

A. Yeah.

Q. Does that mean that, under The Look Policy, headwear—strike that.

Does that mean that, under The Look Policy, models would not be allowed to wear items of clothing that Abercrombie didn't sell?

A. I mean, The Look Policy states that you can wear merchandise that is not ours, as long as it is representative of our style and fit and doesn't bear a logo that you would identify if somebody walked up and saw it.

Q. So if Abercrombie didn't sell headwear other than caps, under The Look Policy, that headwear wouldn't be permitted?

A. Correct.

* * * * *

[208]

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Q. Okay. And what, if anything, have you—do you do to determine whether there's a correlation

between that poor score on properly dressed and a drop in sales?

A. I mean, we talk about that, if a store has had multiple ls over multiple times, and you've looked at some of the other data, and it's showing positive, whether that's shrink or business or promos or weather, or whatever those things are, you try to make a correlation. You're guessing essentially. You can't always be 100 percent sure, but you use your best knowledge to say that is a factor. We believe that in our core values that people that aren't wearing our merchandise, when you come into a store, then you're not representing the brand; therefore, you're representing other brands, or how you're representing our brand is not how we want to wear it, which is a style thing for us which helps us sell our clothes.

* * * * *

[217]

* * * * *

Q. Am I correct that the store experience is the way that you advertise the brand?

A. Yes.

Q. And one of the aspects of the store experience is the appearance of your models; correct?

A. Yes.

Q. But there's other aspects to store experience as well, aren't there?

A. Correct.

Q. Tell me what those are.

A. It could be friendliness. Are you helping people? Store experience could be how the music's going. What you hear. What you smell. We spritz our stores. What you see visually that's happening. All of those things play a part of it.

Q. So the store experience that you've described, you believe that that has worked, and that, as a result, Abercrombie & Fitch has expanded over the years?

A. I believe that. Yes.

Q. My question is not how the properly dressed category has operated to cause Abercrombie to [218] go to 1,100 stores. My question is: How do you know, absolutely, because I think you said that a low properly dressed score would have an adverse impact on the sales of a particular store, as opposed to all the other pieces of the store experience?

A. I don't have specific experiences; but within my 15 years, I have seen stores or managers that do a poor job of enforcing our Look Policy and have seen low sales scores because of it.

Q. How do you know that those low sales scores were just because the managers did a poor job of enforcing The Look Policy as opposed to some other aspect of managing the store?

A. I took the knowledge that I had at those times and the data I had at those times, and that's the conclusion I came up with.

Q. What data did you have at those times?

A. The same stuff I rattled off to you.

Q. The stuff you rattled off to me was?

A. It could be shrink. It could be data on our EUSR system, which is filling. It could be turnover report. It could be hours usage. It could be previous audit scores that I had completed in stores, depending on what level I was. It could be [219] staffing numbers. It could be retention. It could be diversity in the store. If I thought about it, there would probably be a lot more.

Q. So are you saying that in the stores where you've had experience with managers that do a poor job of enforcing The Look Policy, that you have considered all of these other aspects, shrink, USER, turnover, et cetera, and that you have absolutely determined that the reason that the sales of that store declined was because the manager did a poor job of enforcing The Look Policy and nothing else?

A. Yes.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANTS

Mar. 18, 2011

DEPOSITION OF AMY YOAKUM

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[4]

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AMY YOAKUM,

being by me first duly sworn, as hereinafter certified, deposes and says as follows:

EXAMINATION

BY MR. LEE:

Q. Ms. Yoakum, could you state your name for the record, please?

A. Amy Yoakum.

* * * * *

[63]

* * * * *

Q. Okay. And I guess my question is: How would it cause an undue burden if Samantha Elauf had requested an accommodation?

A. We have a—the company has a Look Policy, and The Look Policy's purpose is to support our marketing, our branding, if you will. Abercrombie & Fitch is a company that's grown very quickly, and primarily it's because we don't advertise. Our marketing is done in the store through our models and employees, our store experience and creating loyalty amongst our customers. Our customers come into the stores. They experience the smell and the sound and the models and the images that we produce. And so if we accommodate every request for accommodation that we receive, that could negatively impact that store experience for our customers.

* * * * *

[65]

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Q. Are any exceptions to The Look Policy [66] causing an undue burden on Abercrombie today?

A. There are exceptions to our Look Policy that we have in the stores. They're not common. We evaluate them on a case-by-case basis. We are careful to

accommodate when it's reasonable. I'm not aware any of particular ones. I've granted some because we want to review each situation on its—each request that comes into H.R., we take very seriously. We evaluate it, and if we can accommodate, we try.

However, I go back to my original statement that we have to be careful in our stores about the brand and our marketing. Every exception that we allow has an impact on our store experience.

Q. And how do you know that?

A. Well, Abercrombie & Fitch is successful because of its store experience. Our customers are loyal because of how different we are from every other retailer out there. They continue coming back to us for that experience. They aspire to be like the individuals we hire, and so we are committed to maintaining that standard in our stores and making sure that store experience is consistent from store to store.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 09-CV-602-GKF-FHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO
CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANT

Mar. 31, 2011

DEPOSITION OF FARISA SEPAHVAND

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[3]

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Q. Could you state your name for the record?

A. Yes. Farisa Sepahvand.

Q. And could you spell your first and last name?

A. It's F-a-r-i-s-a; last name, S-e-p-a-h-v-a-n-d.

* * * * *

[23]

* * * * *

Q. How do you know Samantha?

A. We met each other back in tenth grade and she's currently my best friend, has been my best friend for the past five years.

Q. Let me go back. When did you met Heather Cooke?

A. Heather came to the company—I feel like the end of 2007. She came around Christmastime, so I feel like it was December 2007 or January 2008.

Q. Okay.

A. I remember she came from California and she was like the hype because everyone was like, "Oh, we have a new manager from California."

Q. So the first time you met her was when she became assistant manager at the Woodland Hills mall store?

A. Yes.

[24]

Q. Did you socialize with Heather outside of work?

A. Occasionally.

Q. Now at this point, Samantha was your best friend?

A. Yes.

Q. Did—when you saw Heather outside of work, were you with Samantha?

A. I think maybe one or two times I was with Samantha, but it was at the mall, we were shopping.

Q. Were you working?

A. No, I was not.

Q. Okay. Was Heather working?

A. No, she was not.

Q. And were the three of you shopping together?

A. No.

Q. Did you and Sam come to the mall together and met Heather?

A. No, we came to the mall together, but we saw Heather at the mall.

Q. Okay. And to your knowledge, was that the first time that Heather and Samantha met?

A. Samantha would come into the store because she also worked at the mall, she worked at Limited [25] Too, so they knew who she was just because she would come into the store on her breaks. So they didn't personally meet, but they had knowledge of who each other was.

Q. Because she was coming in as your friend?

A. Correct.

Q. Okay. At some point, did you formally introduce Samantha to Heather?

A. Yes.

Q. Do you recall when that was?

A. The time at the mall that we saw her.

Q. Okay. Now that—do you recall when that was?

A. No.

Q. Okay. Well, if—you testified earlier that you thought Heather arrived at the store in late 2007, and Samantha's interview at the Abercrombie Kids store was in the summer of 2008?

A. Yes.

Q. Do you recall how—how much time the introduction preceded the interview by?

A. No.

Q. Okay. At this time that the three of you met in the mall, was there any discussion of Samantha coming to work for Abercrombie?

* * * * *

[30]

Q. Okay. So you described the conversation with Kalen about Samantha. Do you—do you know if Kalen ever met Samantha?

A. They—it was the same thing with Heather, like they just knew each other from her coming in all the time.

Q. And did you approach Kalen?

[31]

A. Yes.

Q. Okay. And what did you ask him?

A. I just asked him, before she had applied, if it was okay, considering she also had a headscarf. I had also told both mangers—both Kalen and Heather—that she had worked for Limited Too for—I feel like it was a year?—for a really long time, and they really liked her there, and that she was just looking for a job at the time, and that she was reliable. I mean, they haven't had issues with her at her previous jobs before that.

Q. So you knew or thought that the look policy may be a problem because she wore a headscarf?

A. Say that again.

Q. When you approached Kalen and asked him is it okay if she applies because she wore a headscarf, you understood that the look policy did not permit headwear?

A. No, I didn't understand that. I was sort of iffy about it because when the interview you, I've heard that they ask what's the definition of diversity, so I thought that it would be okay, but then at the same time I wasn't exactly sure, so I asked him to make sure.

[32]

Q. Okay. Did you look at the policy itself?

A. Not that I remember.

Q. Okay. And what did Kalen tell you, as best you can remember?

A. He told me, "Yeah, I think it should be totally okay. I worked with someone previously that was Jewish and he wore a yarmulke, and his yarmulke was white."

Q. Anything else?

A. Just that—he said that she was really pretty and, "I don't see what the problem would be, especially if she didn't wear a headscarf that was black."

Q. Why was the color of the headscarf important?

A. Abercrombie doesn't permit people to wear black.

Q. Did you—do you recall saying anything else to Kalen in this conversation?

A. No, just that I was going to tell her that it would be okay and she should apply.

Q. Okay. And did you?

A. Yep, yes.

Q. You told Samantha to apply?

A. Yes.

[33]

Q. Okay. Did you tell her about the look policy?

A. I told her that she just wasn't allowed to wear black.

Q. Did you tell her anything else about the look policy before she applied?

A. No, I'm pretty sure she knew.

Q. How—how—how do you—why do you think she knew?

A. It's kind of common sense. I mean, when you go in the store, everyone's like wearing polos and regular jeans and white Converse. She was in there all the time so she would see the way that we dressed.

Q. Okay. So the only specific instruction you gave her was "Don't wear black"?

A. Uh-huh, yes.

Q. Did you talk to her at all about the headscarf?

A. Yes.

Q. What did you say?

A. Don't wear a black headscarf.

Q. And that was it?

A. Yes.

* * * * *

No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
JENNIFER S. GOLDSTEIN
Acting Assistant General Counsel
JAMES M. TUCKER
Attorney
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
IAN HEATH GERSHENGORN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1). "Religion" includes "all aspects of religious observance and practice" unless "an employer demonstrates that he is unable to reasonably accommodate" a religious observance or practice "without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

The question presented is whether an employer can be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

PARTIES TO THE PROCEEDING

Petitioner, the Equal Employment Opportunity Commission, was the plaintiff in the district court and the appellee in the court of appeals.

Respondent Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids, was the defendant in the district court and the appellant in the court of appeals.

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TABLE OF AUTHORITIES

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American Tobacco Co. v. *Patterson*, 456 U.S. 63 (1982) 25
Ansonia Bd. of Educ. v. *Philbrook*, 479 U.S. 60 (1986) 20, 27

Cases—Continued: Page

Brown v. *Polk Cnty.*, 61 F.3d 650 (8th Cir. 1995), cert. denied, 516 U.S. 1158 (1996) 10, 17, 26
Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742 (1998) 37
Desert Palace, Inc. v. *Costa*, 539 U.S. 90 (2003) 22
Dixon v. *Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010) 10, 17
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991) 31
Federal Express Corp. v. *Holowecki*, 552 U.S. 389 (2008) 31
Furnco Constr. Corp. v. *Waters*, 438 U.S. 567 (1978) 29
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 25
Gross v. *FBL Fin. Servs.*, 557 U.S. 167 (2009) 23
Heller v. *EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993) 10, 17, 26
Hellinger v. *Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999) 10, 17, 26
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977) 19, 24
Ledbetter v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) 24
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 8, 28
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 25
Ricci v. *DeStefano*, 557 U.S. 557 (2009) 24
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 21, 31
Smith v. *Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) 10
Staub v. *Proctor Hosp.*, 131 S. Ct. 1186 (2011) 24, 37
Taylor v. *Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) 32

Cases—Continued: Page

Texas Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248 (1981) 29
Thomas v. *National Ass'n of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000) 9, 10, 13
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977) 3, 25
University of Tex. Sw. Med. Ctr. v. *Nassar*, 133 S. Ct. 2517 (2013) 19, 23
Vance v. *Ball State Univ.*, 133 S. Ct. 2434 (2013) 31
Watson v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) 24

Statutes and regulations:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... *passim*
42 U.S.C. 2000e(a)-(b) 3
42 U.S.C. 2000e(b) 35
42 U.S.C. 2000e(j) 3, 18, 22, 26
42 U.S.C. 2000e-2(a)(1) 2, 18, 19, 22, 35, 36
42 U.S.C. 2000e-2(m) 2, 19, 22, 23
42 U.S.C. 2000e-12(a) 31, 3a
Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (42 U.S.C. 2000e-2(m)) 2
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (42 U.S.C. 2000e(j)) 3
29 C.F.R.:
Section 1605.2(b)(1) 34
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Section 1605.2(c)(1) 14, 34
Section 1605.2(c)(2) 34

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Miscellaneous:

2 EEOC Compl. Man. (BNA) (July 2008) 14, 30, 33

Restatement (Second) Agency (1957) 37

U.S. Equal Emp't Opportunity Comm'n:

Best Practices for Eradicating Religious Discrimination in the Workplace, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last modified July 23, 2008) 30

EEOC Issues New Publications on Religious Garb and Grooming in the Workplace (Mar. 6, 2014), http://www.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm 32

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In the Supreme Court of the United States

No. 14-86

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-91a) is reported at 731 F.3d 1106. The opinion and order of the district court (Pet. App. 92a-120a) is reported at 798 F. Supp. 2d 1272.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2013. A petition for rehearing was denied on February 26, 2014 (Pet. App. 121a-123a). On May 19, 2014, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including June 26, 2014. On June 17, 2014, Justice Sotomayor further extended the time to July 25, 2014, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 2, 2014.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against job applicants or employees based on religion, among other attributes. The statute provides:

> It shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)(1). The statute further provides that an employer commits an unlawful hiring practice "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (42 U.S.C. 2000e-2(m)).

In 1972, Congress clarified that employment decisions are impermissibly based on "religion" when they are based on religious practices that the employer could reasonably accommodate. Congress provided that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless

an employer demonstrates that he is unable to reasonably accommodate * * * an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (42 U.S.C. 2000e(j)). Accommodation of a religious practice causes undue hardship when it would impose more than *de minimis* costs on the employer. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977); see also 29 C.F.R. 1605.2(e)(1).

Under Title VII, the term "employer" includes, with exceptions not relevant here, certain individuals and companies engaged in commerce and "any agent of" a covered employer. 42 U.S.C. 2000e(a)-(b).

2. a. Respondent operates clothing stores under brand names including Abercrombie & Fitch, Abercrombie Kids, and Hollister. Pet. App. 2a. The company requires all of its store employees to comply with a "Look Policy" set out in its employee handbook. *Id.* at 94a; J.A. 42, 124-128. The policy applies to all store employees once hired, but job applicants are not required to be in compliance during job interviews. Pet. App 94a; J.A. 46.

The policy contains rules for clothing, jewelry, facial hair, and footwear. Pet. App. 3a, 94a; J.A. 124-128. It is intended to signal to shoppers that respondent is a purveyor of "a classic East Coast collegiate style of clothing." Pet. App. 2a-3a (citation omitted). As relevant here, the Look Policy bars employees from wearing "caps," which respondent deems "too informal for the image we project." J.A. 127. While the policy does not define "caps," the district manager responsible for the store at issue in this case interpreted the

prohibition on caps to apply to headscarves. Pet. App. 3a, 9a; J.A. 127, 134-137. Respondent also bars its employees from wearing black clothing on the job. Pet. App. 3a. Respondent's human resources section may grant exceptions to these rules, so long as the exceptions do not undermine respondent's brand identity. Pet. App. 94a; J.A. 49-50.

Respondent has policies that govern its hiring process, as well. Interviewers evaluate applicants using the company's "official interview guide," which requires interviewers to consider the applicant's "appearance & sense of style," whether the applicant is "outgoing & promotes diversity," and whether the applicant has "sophistication & aspiration." Pet. App. 8a (quoting J.A. 119). Applicants are rated on a three-point scale in each category. *Ibid.*; see also J.A. 119. An applicant who receives a score in "appearance" of less than two, or a total score of five or less, is not recommended for hiring. Pet. App. 8a; see also J.A. 119.

b. Samantha Elauf identifies as a Muslim. Pet. App. 94a-95a. She has worn a headscarf, or hijab, every day since she was 13 years old. *Id.* at 95a & n.1; J.A. 18-19. This practice reflects Elauf's understanding of what the Quran requires. J.A. 17-18.

In 2008, when Elauf was 17, she applied for a sales position at an Abercrombie Kids store operated by respondent in the Woodland Hills Mall in Tulsa, Oklahoma. Pet. App. 5a; J.A. 19-20. Respondent refers to sales positions as "model" positions. Pet. App. 3a; J.A. 105-106. The position's responsibilities include operating the cash register; opening and closing the store; greeting customers and helping them find clothing; cleaning, organizing, and maintaining the store; train-

ing other employees; preventing shoplifting; and "represent[ing] the brand" in the store. J.A. 106-107; see also J.A. 60-61.

Elauf was unaware of the "Look Policy" when she applied to work at the Abercrombie Kids store. Pet. App. 97a; J.A. 21, 29. Nonetheless, prior to her job interview, Elauf asked her friend, Farisa Sepahvand, a current employee, whether her headscarf would be permissible attire as an employee of respondent. Pet. App. 5a; J.A. 26-28. Sepahvand raised the issue with Kalen McJilton, an assistant manager at the store. Pet. App. 6a; J.A. 252-254. McJilton had previously worked at one of respondent's stores with an employee who wore a white yarmulke, and he told Sepahvand that he did not see any problem with Elauf's wearing a headscarf, especially if she did not wear a headscarf that was black. Pet. App. 6a; J.A. 254. Sepahvand communicated to Elauf that a headscarf would be permitted, but that because of respondent's prohibition on black clothing, she should wear a headscarf in a different color. Pet. App. 6a-7a; J.A. 255. Elauf seemed agreeable to that restriction. Pet. App. 6a-7a.

Elauf was interviewed for a job by Heather Cooke, an assistant store manager. In that capacity, Cooke was "in charge of hiring new employees." J.A. 53; see also J.A. 54-56. Cooke would consult with higher-level managers if she had a question regarding whether an applicant was an appropriate candidate, but would make "the final decision on whether an applicant for a model position would be hired." J.A. 55-56.

At the interview, Elauf wore jeans and a t-shirt in styles consistent with those sold under the Abercrombie brand, as well as the black headscarf that Elauf typically wore. Pet. App. 7a; J.A. 26-27, 30-31. To

Cooke, who had also seen Elauf wearing a headscarf on other occasions, see J.A. 68-69, 72-73, the headscarf signified "[t]hat [Elauf] was a Muslim" and that "that was the religious reason why she wore her head scarf," J.A. 76-77; see also J.A. 102. During the interview, Cooke asked Elauf questions about her job qualifications and described responsibilities of the position Elauf was seeking. J.A. 78, 115-120. Cooke did not suggest that wearing a headscarf would be prohibited. See Pet. App. 97a; J.A. 30-33, 63-65, 80-81.

Cooke was impressed by Elauf and rated her accordingly. J.A. 84-86, 92-93. She gave Elauf two out of three points on each of the three criteria in respondent's official interview guide—"appearance and sense of style," "outgoing and promotes diversity," and "sophistication and aspiration." Pet. App. 101a; J.A. 84-86. This score amounted to an assessment that Elauf "meets expectations" and should be hired. Pet. App. 8a; J.A. 119.

Although Cooke had the authority to make hiring decisions without further consultation, see J.A. 54-56, she decided to ask the manager of her store whether Elauf's headscarf violated respondent's policies, J.A. 79. Cooke was "unclear" about whether the headscarf would conflict with the Look Policy, which by its terms prohibited "caps," not headscarves. J.A. 80, 99.

After the store manager was unable to clarify the application of respondent's Look Policy, Cooke consulted with Randall Johnson, the district manager. Pet. App. 8a-9a; J.A. 87. Johnson oversaw seven stores operated by respondent, but was not responsible for hiring sales associates—those decisions were "solely * * * the store manager's responsibility." J.A. 132-133.

Johnson told Cooke that a headscarf would violate respondent's Look Policy. J.A. 87, 134. Cooke testified that after Johnson did so, Cooke explained that she understood Elauf to be a Muslim for whom the headscarf was religious garb:

> I asked him, you know, she wears the head scarf for religious reasons, I believe. And he said, "You still can't hire her because someone can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them."

J.A. 87. Cooke said that she protested, telling Johnson that she "believed that [Elauf] was Muslim, and that was a recognized religion"; "that she was wearing it for religious reasons"; and that Cooke "believe[d] that we should hire her." *Ibid.*

According to Cooke, Johnson was unmoved, and instructed her not to hire Elauf. J.A. 87. She said that Johnson directed her to lower Elauf's applicant score in the category of "appearance and sense of style" from two to one, yielding an overall score that corresponds to a rating of "below expectations" and to a recommendation that the applicant not be hired. Pet. App. 101a-102a; J.A. 85-86, 93-94; see also J.A. 119. Cooke said she did so, filling out a new form and throwing away the original rating sheet. Pet. App. 102a; J.A. 93-94.

Johnson gave a different account. He recalled Cooke asking for guidance concerning Elauf's headscarf. See J.A. 134. Johnson recalled asking Cooke, "is she compliant with the [Look Policy], does she pass," and after Cooke responded in the negative, he responded that "there's your answer. You cannot hire her." *Ibid.* But he denied that Cooke had told him

that she thought Elauf wore the headscarf for religious reasons, and he also denied making a comment about people painting themselves green. J.A. 146-147. He said he did not instruct Cooke to fill out a new rating form that changed Elauf's applicant scores. J.A. 147.

Cooke did not extend Elauf a job offer, nor did she contact Elauf to notify her of the decision. See J.A. 89. After Sepahvand pressed Cooke on the reason that Cooke had not hired her friend, however, Cooke told Sepahvand that she had not hired Elauf because of her headscarf. J.A. 90-91. Elauf learned the reason she had not been hired from Sepahvand. J.A. 35-36.

3. The Equal Employment Opportunity Commission (EEOC) filed suit, alleging that respondent had violated Title VII by "refus[ing] to hire Ms. Elauf because she wears a hijab" and "fail[ing] to accommodate her religious beliefs by making an exception to the Look Policy." Pet. App. 9a (citation omitted). Both parties moved for summary judgment. *Id.* at 10a.

4. The district court granted summary judgment to the EEOC. Pet. App. 92a-120a. The court approached the case using a burden-shifting framework that courts of appeals have applied to claims of religious discrimination. The district court noted that the Tenth Circuit had adopted a framework modeled on *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), to address claims of unlawful discrimination based on religious observance or practice. Under that framework, a plaintiff seeking to make out a prima facie case of discrimination must show that (1) the applicant had a bona fide religious belief that conflicts with an employment requirement; (2) she informed

the employer of this belief; and (3) she was not hired for failing to comply with the employment requirement. Pet. App. 108a-109a (citing *Thomas* v. *National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000)). If the plaintiff makes these showings, the district court noted, the burden shifts to the defendant to rebut one or more elements of the plaintiff's case; show that it offered a reasonable accommodation; or show that it was unable to accommodate the religious practice without undue hardship. *Id.* at 109a (citing *Thomas*, 225 F.3d at 1156).

The district court found no question that the EEOC had established the first and third elements of a prima facie case—that Elauf wore a headscarf as part of her Muslim faith and that respondent declined to hire Elauf because her headscarf conflicted with its Look Policy. Pet. App. 109a-115a. The court further concluded that respondent had failed to rebut these showings, because respondent had not disputed that it declined to hire Elauf as a result of her headscarf, *id.* at 110a, and because the record was devoid of evidence contradicting Elauf's testimony that her practice of wearing a hijab reflected her religious beliefs, *id.* at 114a-115a.

The district court also found that the EEOC had presented sufficient evidence to establish that respondent had notice of the religious nature of Elauf's practice when respondent declined to hire Elauf, rejecting the notice standard proposed by respondent in favor of the standard adopted by a number of courts of appeals. Pet. App. 109a, 115a. Respondent, the court explained, had contended that it could not be on notice of the religious nature of Elauf's practice because "Elauf did not tell the interviewer she had a religious

belief that conflicted with the Look Policy and that she needed an accommodation." *Id.* at 115a. The court held, however, that explicit, direct notice of a conflict from an employee was not a prerequisite for Title VII protection. Instead, accepting a standard adopted by three courts of appeals, the court concluded that the notice requirement is met "when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." *Id.* at 115a-120a (citing *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Hellinger* v. *Eckerd Corp.*, 67 F Supp. 2d 1359, 1361 (S.D. Fla. 1999)).

The district court found that the approach of those courts better served the objectives of Title VII than a rule under which an employee had protection against religious-practice-based discrimination only if the employer received explicit, direct notice from the employee that a practice was religious. The district court explained that a rule requiring an employer to have enough information to make it aware of a conflict "prevent[s] ambush of an unwitting employer." Pet. App. 117a. Such a rule also serves Title VII's objective of encouraging an interactive process in which employers and employees strive for mutually acceptable accommodations. See *id.* at 116a-117a (discussing *Thomas*, 225 F.3d at 1155; *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1171-1172 (10th Cir. 1999)). Under a rule requiring explicit and direct notice from an employee, however, no interactive process concerning

accommodation would occur when only the employer was aware of a potential conflict, because job applicants could not be expected to request an accommodation when they were unaware of a conflict in the first place. *Id.* at 118a n.11. Here, "there could be no bilateral, interactive process of accommodation because, although [respondent] was on notice that Elauf wore a head scarf for religious reasons, it denied Elauf's application for employment without informing her she was not being hired or telling her why." *Ibid.*

The district court found that respondent had adequate notice of religious practice under the standard applied in a number of courts of appeals, because respondent's hiring personnel had correctly inferred that Elauf's headscarf reflected religious practice. Specifically, the court found respondent had "enough information to make respondent aware there exist[ed] a conflict between [Elauf's] religious practice or belief and a requirement for applying for or performing the job," Pet. App. 115a, because it was "undisputed" that Cooke, who interviewed Elauf wearing a headscarf, "knew [Elauf] wore the head scarf based on her religious belief," *id.* at 117a & n.10. And because Cooke "had responsibility for hiring decisions at the Abercrombie Kids store," her correct understanding was properly attributed to respondent, regardless of whether Cooke had (as she testified) told her district manager that Elauf wore a headscarf for religious reasons. *Id.* at 117a n.10.

The district court also found respondent had offered only speculation to support its claim that granting Elauf a religious accommodation would have resulted in "undue hardship." Pet. App. 119a (citation omitted). It emphasized that respondent could not

cite studies or identify examples from respondent's own past experience that supported its contention that permitting Elauf a religious accommodation would have negatively impacted respondent's brand. *Id.* at 118a. Although respondent called a witness, Dr. Erich A. Joachimsthaler, who opined about the importance of in-store experience to respondent's marketing strategy, the court noted that Dr. Joachimsthaler had not "collect[ed] or analyze[d] data to corroborate his opinion" that religious exceptions to respondent's Look Policy would undermine respondent's brand. *Id.* at 119a. Further, the court noted, the numerous exceptions respondent had granted to the Look Policy in the past—including eight or nine headscarf exceptions—undercut the claim that a religious accommodation for Elauf would have been an undue hardship. *Ibid.*

After finding no dispute of material fact concerning whether respondent had notice of Elauf's religious practice; whether respondent had declined to hire Elauf because of her religious practice; and whether accommodation would have posed undue hardship, the district court ordered summary judgment in favor of the EEOC as to liability. Pet. App. 92a-120a. After a trial limited to damages, a jury awarded $20,000 in compensation. *Id.* at 12a.

5. a. The court of appeals reversed, ordering summary judgment in favor of respondent. Pet. App. 1a-91a. The court concluded that an employer is not prohibited under Title VII from taking action against an applicant or employee based on the religious practice of the applicant or employee unless the applicant or employee has given the employer explicit, verbal notice of a religious conflict, *id.* at 28a, giving rise to

"particularized, *actual* knowledge of the key facts that trigger its duty to accommodate," *id.* at 34a. As to the source of notice, the court rejected the EEOC's position that Title VII's notice requirements are met when an employer has notice of a conflict between an applicant's religious practice and a workplace rule "from an affirmative statement by the individual, *or some other source.*" *Id.* at 30a; see also *id.* at 29a (explaining the EEOC's position that "although [respondent] is required to have had notice that Elauf needed an accommodation, the notice need not have been strictly in the form of Elauf verbally requesting an accommodation") (citation omitted). Instead, the court concluded, explicit notice from the applicant herself was required: "[A] plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule." *Id.* at 28a; see *id.* at 46a.

The court of appeals "recognize[d] that some courts have taken a different path on this question" but stated that the court was "confident" that it was correct to require explicit and direct notice from the employee or applicant. Pet. App. 46a. First, it found support in its own prior cases stating that a plaintiff must establish that an employee "informed his or her employer" of the religious belief requiring accommodation. *Id.* at 30a (quoting *Thomas*, 225 F.3d at 1155); see *id.* at 32a-33a.

Second, the court of appeals concluded that its approach properly allocated burdens under Title VII because important facts about the religious beliefs of

an applicant or employee are typically known only to the applicant or employee. Pet. App. 46a. In particular, only an applicant or employee would typically know if particular practices reflected religious faith, personal preferences, or culture. *Id.* at 46a-50a. Similarly, the court reasoned, only an applicant or employee would typically know whether the belief underlying a religious practice was inflexible, which the court understood to be a requirement in order for a practice to merit accommodation under Title VII. *Id.* at 52a-53a. In addition, the court deemed its rule to be most compatible with the EEOC's practice of discouraging employers from inquiring as to an applicant's religious beliefs as part of the hiring process. *Id.* at 53a-55a.

The court of appeals concluded its rule was further supported by EEOC guidance stating that an employer has an obligation to reasonably accommodate religious practices "[a]fter an employee or prospective employee notifies the employer * * * of his or her need for a religious accommodation." 29 C.F.R. 1605.2(c)(1); see Pet. App. 55a-56a. The court also relied on agency manuals stating that an applicant or employee "must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work" and "cannot assume that the employer will already know or understand it." *Id.* at 56a (quoting 2 EEOC Compl. Man. (BNA) § 12-IV(A)(1), at 628:0020 (July 2008) (*EEOC Compliance Manual*)).

Applying its standard, the court of appeals concluded that respondent was entitled to summary judgment because respondent had not received notice of a conflict through Elauf's verbal statements. Pet. App. 28a. "[T]here is no genuine dispute of material

fact," the court wrote, that Elauf "never informed [respondent] before its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommodation for that practice, due to a conflict between it and [respondent's] clothing policy." *Ibid.*

The court of appeals added that even if Title VII permitted notice of a conflict between a work rule and a religious practice to come from a source other than a job applicant or employee, the notice respondent received fell short, because it did not meet what the court took to be a further requirement that an employer have "particularized, actual knowledge" of a conflict before an applicant or employee could receive Title VII protections. Pet. App. 39a-40a; see also *id.* at 34a. It found insufficient an employer's correct inference that a conflict existed. Thus, the court concluded, it was not relevant in the instant case that the assistant manager responsible for hiring at the Abercrombie Kids store had correctly "assumed that Ms. Elauf wore her hijab for religious reasons and felt religiously obliged to [do] so," *id.* at 40a (emphasis omitted), because "a correct assumption does not equal actual knowledge," *id.* at 42a n.9.

Because the court of appeals concluded that respondent was entitled to summary judgment on notice grounds, it did not address respondent's other challenges to the district court's holding. Specifically, it did not address respondent's challenges to the district court's determinations that there was no material dispute of fact concerning Elauf's bona fide religious beliefs or concerning whether accommodating Elauf's headscarf would have imposed an undue hardship on respondent.

b. Judge Ebel concurred in part and dissented in part. Pet. App. 73a-91a. He dissented from the court of appeals' conclusion as to the notice required to trigger an employer's obligations under Title VII. *Id.* at 74a-81a, 84a-88a. Judge Ebel explained that it "makes no sense to apply, reflexively and inflexibly," a requirement that a job applicant give notice of a religious conflict to an employer through explicit verbal notice. *Id.* at 76a. In some cases, he observed, it is the employer, not the applicant, that has superior knowledge of a conflict between work rules and an applicant's religious practices. Here, for instance, "the reason Elauf never informed" respondent of the conflict between her religious practice and respondent's Look Policy was that "Elauf did not know that there was a conflict." *Id.* at 75a-76a. In contrast, respondent "did know there might be a conflict, because it knew that Elauf wore a headscarf, assumed she was Muslim and that she wore the headscarf for religious reasons, and knew its Look Policy * * * prohibited its sales models from donning headwear." *Id.* at 76a.[1] He wrote that under these circumstances it would make little sense to require the employee to

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[1] Judge Ebel noted that the evidence in this case "arguably suggests that [respondent] affirmatively misled Elauf into believing that there was no problem with her wearing a hijab while working in one of [respondent's] stores, which may explain why she did not raise the issue during her job interview." Pet. App. 83a n.6. Elauf, he emphasized, had reason to believe based on representations from a managerial employee that her headscarf would pose no problem. In particular, he noted, "Elauf, through a friend, inquired of one of [respondent's] store managers whether there was a problem with her wearing a hijab while working" at respondent's store, and she "was told that it would be no problem so long as the hijab was not black." *Id.* at 82a; see p. 5, *supra*.

give notice of a religious conflict in order for Title VII's protections of religious observance to apply. Doing so, he emphasized, would undercut Title VII's objective of promoting dialogue regarding possible religious accommodations, because it would permit an employer to decline to hire an applicant (or to fire an employee) when it suspected a religious conflict.

Rejecting the panel majority's direct, explicit notice requirement, Judge Ebel stated that he would hold an employer had adequate notice of a conflict between work rules and an applicant's religious practice when the employer understood there was a possible conflict. He found this conclusion consistent with decisions of other circuits that a plaintiff established a prima facie case under Title VII if she showed "that the employer knew of a conflict between the plaintiff's religious beliefs and a job requirement, regardless of how the employer acquired knowledge of that conflict." Pet. App. 84a-85a (citing *Dixon*, 627 F.3d at 855-856; *Brown*, 61 F.3d at 652-653; *Heller*, 8 F.3d at 1436-1437; *Hellinger*, 67 F. Supp. 2d at 1361-1363). See also *id.* at 87a (stating Judge Ebel "would follow the holdings" in those cases).

Applying this standard, Judge Ebel concluded that the majority had erred in granting summary judgment to respondent. Judge Ebel wrote that the EEOC had established a prima facie case—and that a jury could find in the EEOC's favor—in light of the evidence that respondent "assumed Elauf was a Muslim, that she wore a hijab for religious reasons, that she would insist on wearing a hijab when working in an Abercrombie store, and then, based on those assumptions and without first initiating any dialogue with Elauf * * * refused to hire Elauf because she

wore a hijab." Pet. App. 87a. Judge Ebel stated, however, that he would have remanded the case for trial, rather than affirming summary judgment in favor of the EEOC, because he believed there were factual disputes relevant to liability. He stated, in particular, that there were "factual disputes as to whether the circumstances presented here triggered [respondent's] duty to initiate an interactive dialogue with Elauf in order to determine whether she had a religious practice that conflicted with [respondent's] Look Policy." *Id.* at 90a-91a. And there were in his view factual disputes concerning whether granting Elauf a religious accommodation would constitute an undue hardship for respondent. *Id.* at 91a n.2.

6. By an evenly divided vote among active judges, the court of appeals denied rehearing en banc. Pet. App. 121a-123a.

SUMMARY OF THE ARGUMENT

Title VII prohibits an employer from refusing to hire a job applicant based on what the employer correctly understands to be the job applicant's religious observance or practice, unless accommodating that practice would cause the employer undue hardship.

A. 1. The text of Title VII reaches employers who discriminate in hiring based on what they understand to be religious practices. Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire * * * any individual * * * because of such individual's * * * religion," including because of any aspect of such individual's "religious observance and practice" that could be accommodated without undue hardship. 42 U.S.C. 2000e(j), 2000e-2(a)(1). An employer who refuses to hire a person on the basis of what it correctly understands to be a religious prac-

tice has refused to hire a person "because of" the religious practice in the ordinary sense—that is, "by reason of" or "on account of" the religious practice. *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2527 (2013) (citation omitted). And the employer's actions also satisfy the lesser contributing-causation standard—under which a refusal to hire is a prohibited employment practice if the religious practice was a "motivating factor" in the employment decision. 42 U.S.C. 2000e-2(m).

2. Intentional discrimination based on "race, color, religion, sex, or national origin" is the core conduct that Congress sought to prohibit under Title VII. 42 U.S.C. 2000e-2(a)(1). "Disparate treatment"—in which an employer has the intent or motive to discriminate based on a protected attribute—was "the most obvious evil that Congress had in mind." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Discrimination against a job applicant based on what the employer correctly understands to be the applicant's religious practice is just this type of core prohibited conduct.

3. Consideration of Title VII's well-settled purposes reinforces the applicability of Title VII to cases in which an employer discriminates based on what it correctly understands to be a job applicant's religious practice. By enacting Title VII, Congress sought to eliminate decision-making based on particular aspects of identity that Congress deemed categorically improper grounds for hiring decisions. The court of appeals' rule would undermine this objective, by permitting employers to choose job applicants based on one of the attributes that Congress sought to remove from hiring processes.

In enacting the portion of Title VII requiring reasonable accommodations of religious practices that would not pose undue hardship, Congress also sought to generate "bilateral cooperation" between employers and employees to reach acceptable accommodations between religious practices and work rules. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted). The court of appeals' rule would undermine this objective as well, by permitting employers to act against employees based on what they correctly understand to be religious practices, instead of attempting a "reconciliation of needs," *ibid.* (citation omitted), whenever the court of appeals' stringent notice requirements are not met.

B. 1. None of the reasons offered by the court of appeals justify the court's deviation from text, precedent, and purpose. The court's decision relied to some degree on its own prior decisions formulating a burden-shifting framework for religious-accommodation claims. But no part of this Court's jurisprudence concerning burden-shifting frameworks supports a rigid notice requirement for religious-accommodation claims.

The court of appeals next suggested that Title VII protections are appropriately conditioned on notice from applicants because applicants are best positioned to identify conflicts between work rules and religious practices. This premise, however, was incorrect. While applicants have superior knowledge of their religious beliefs, employers have superior knowledge of work rules. Thus, as this case illustrates, employers sometimes identify religious conflicts not known to applicants. Moreover, the court was mistaken in thinking its limitations on Title VII were necessary to

ensure that employers do not feel obligated to routinely inquire into the sensitive area of religious practices. Employers who suspect a possible religious conflict can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would be unable to comply.

2. The court of appeals also erred in drawing support for its limitations on Title VII from statements in EEOC guidance. Statutory text, precedent, and purposes leave no room for debate concerning Title VII's applicability to intentional discrimination based on religious practices such as that at issue here. To the extent that consideration of agency views is useful, however, the relevant inquiry would be whether the agency's position—that Title VII does not incorporate the notice limitations imposed by the court of appeals—warrants deference under the framework of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). The EEOC's position—taken in this case, in prior litigation, and in recent guidance—is consistent with the EEOC's earlier published guidance.

C. On the undisputed facts in this case, the EEOC's claim against respondent was not deficient on notice grounds. There is no material dispute of fact that the assistant manager who failed or refused to hire Elauf for a position in respondent's store did so because Elauf wore a headscarf, which the assistant manager correctly understood to reflect religious practice. That manager therefore "fail[ed]" and "refuse[d] to hire" Elauf "because of" an aspect of "religious observance and practice." The court of appeals' decision with respect to notice should be reversed, and the case remanded for determination of the remaining aspects of respondent's appeal.

ARGUMENT

TITLE VII BARS AN EMPLOYER FROM REFUSING TO HIRE AN APPLICANT BASED ON WHAT THE EMPLOYER CORRECTLY UNDERSTANDS TO BE A RELIGIOUS PRACTICE, ABSENT A SHOWING OF UNDUE HARDSHIP

Under Title VII, it is an unlawful employment practice for an employer "to fail or refuse to hire * * * any individual * * * because of such individual's * * * religion," including because of any aspect of such individual's "religious observance and practice" that could be accommodated without undue hardship. 42 U.S.C. 2000e(j), 2000e-2(a)(1). The plain terms of this provision, this Court's past decisions, and consideration of the statute's well-settled purposes establish that Title VII forbids an employer from refusing to hire a job applicant based on what the employer correctly understands to be the job applicant's religious practices.

A. Text, Precedent, And Considerations Of Purpose Establish The Applicability Of Title VII Protections

1. The "starting point" for analysis of Title VII is the "statutory text." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98-99 (2003). By its terms, Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire * * * any individual * * * because of" religion, 42 U.S.C. 2000e-2(a)(1), which "includes all aspects of religious observance and practice," unless the company demonstrates that accommodating the practice would have constituted an undue hardship, 42 U.S.C. 2000e(j); see also 42 U.S.C. 2000e-2(m) (further stating that an unlawful employment practice is "established when the complaining party demonstrates that race, color, religion, sex, or

national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

The language of this prohibition easily reaches cases in which an employer declines to hire someone based on what it correctly understands to be a religious practice. When an employer deliberately chooses not to hire an applicant based on a religious practice, the employer's failure or refusal to hire is "because of" a religious practice in its ordinary sense—that is, it is "by reason of" or "on account of" the employee's religious practice. *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2527 (2013) (quoting *Gross* v. *FBL Fin. Servs.*, 557 U.S. 167, 176 (2009)) (setting forth "ordinary meaning" of "because of"). The employer's decision also satisfies the contributing-causation standard that is equally sufficient to establish liability under Title VII. When an employer chooses not to hire a person based on what the employer understands to be a religious practice, the religious practice was a "motivating factor" in the employment decision. 42 U.S.C. 2000e-2(m). Giving the text of Title VII its ordinary meaning, an employer that declines to hire an applicant based on what the employer correctly understands to be a religious practice violates Title VII unless accommodating the religious practice would have posed an undue hardship.

2. This Court's decisions make clear that intentional choices by employers to disfavor applicants or employees based on protected attributes are at the heart of Title VII's prohibitions. The "most obvious evil that Congress had in mind" when it sought to prevent hiring based on impermissible considerations was "disparate treatment" based on protected attrib-

utes. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). An employer engages in disparate treatment when the employer "had a discriminatory intent or motive for taking a job related action." *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009) (internal quotation marks omitted) (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988)); see also, *e.g.*, *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007); *Teamsters*, 431 U.S. at 335 n.15. An employer has "discriminatory intent or motive" when the employer discriminates based on a protected attribute—even if the employer does so for reasons unrelated to animus. See *Ricci*, 557 U.S. at 579-580 (noting that city's use of race-based hiring to achieve "well intentioned or benevolent" aims still qualified as disparate treatment based on race for purposes of Title VII absent a valid defense); see also *Staub* v. *Proctor Hosp.*, 131 S. Ct. 1186, 1194 n.3 (2011) (noting that under tort law, intent denotes "that the actor desires to cause consequences of his act, or that he believes the consequences are substantially certain to result from it") (citation omitted). Application of these settled principles to the religious-accommodation context is straightforward: When an employer declines to hire a prospective employee based on what it correctly believes to be a religious practice—and thereby intentionally discriminates based on religious practice—the employer has engaged in the type of disparate-treatment discrimination at the heart of Title VII's prohibitions, unless the employer is excused under the undue hardship exception.

3. Consideration of statutory purpose yields the same result. Because Title VII is written "in the

broadest terms to prohibit and remedy discrimination," the statute "must be given a liberal interpretation" to achieve its objectives, and "exemptions from its sweep" must "be narrowed and limited to effect the remedy intended." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 80-81 (1982) (citation omitted). Application of this principle compels rejection of the court of appeals' limitations on Title VII protections. Permitting an employer to discriminate based on what it correctly understands to be religious practice—in those cases in which the employer has not obtained actual knowledge of the religious nature of the practice based on explicit notice from the employee—would undercut the statute's recognized objectives.

By enacting Title VII, Congress sought to eliminate decision-making based on particular aspects of identity that Congress deemed unrelated to merit. The statute thus reflects a judgment that those attributes are not proper bases for hiring decisions. See, *e.g.*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) (noting that statute reflects judgment that "sex, race, religion, and national origin are not relevant to the selection, evaluation or compensation of employees"); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971) (describing purpose of Title VII as "to promote hiring on the basis of job qualifications" rather than protected characteristics) (citation omitted). The law's "principal goal," accordingly, was to "eliminate * * * discrimination in employment" based on those attributes, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 n.6 (1977) (citation omitted), including those aspects of religious observance or practice that an employer could reason-

ably accommodate without undue hardship, 42 U.S.C. 2000e(j).

The court of appeals' holding would run contrary to this objective. Each of its requirements would permit employers to turn down applicants based on the very criteria Congress forbade. Under the court's direct-notice standards, employers would be free to discriminate in those cases in which the employer's awareness of a conflict between work rules and an applicant's religious practices comes from, for instance, a current employee; statements of an applicant that did not amount to an explicit declaration of conflict; or the employer's own accurate inference of religious practice, based on observing practices linked with religious observance. See, *e.g.*, *Hellinger* v. *Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999) (notice from different employee); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (imprecise statements of employee); *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 450-451 (7th Cir. 2013) (same); *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc) (correct inference from employee's activities), cert. denied, 516 U.S. 1158 (1996). And under the court of appeals' "actual knowledge" requirement, employers would be free to discriminate based on the criteria Congress deemed impermissible when the employers stayed a step shy of certainty as to the religious nature of an applicant's practice. These limitations would provide a ready means to circumvent Title VII's protections.

Title VII's objective of promoting dialogue concerning possible accommodations would also fall victim to the court of appeals' requirements of explicit employee notice and "actual knowledge." When Con-

gress enacted protections for religious practice, it sought to generate "bilateral cooperation" between employers and employees concerning possible conflicts, directed at "an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted); see also *ibid.* (discussing legislative history supporting this view). The court of appeals' rule reduces employers' incentives to come to the table when they become aware of conflicts between religious practice and work rules. An employer who learns of a conflict based on information other than direct, explicit notice from the employee would have no incentive to attempt cooperative "reconciliation of the needs," *ibid.* (citation omitted), with the additional obligations that process may entail. Similarly, an employer who correctly infers that a practice is a religious one, but is not certain, will have little incentive to explore accommodation, because without "actual knowledge" gleaned from the applicant, the employer is entirely freed of Title VII obligations. Such employers may find it simplest to avoid hiring the observant applicant based on religious practices—a result that Title VII sought to avoid. Cf. *ibid* (disapproving as inconsistent with purpose a statutory reading that would that give employees an incentive to "hold out" in accommodations process rather than negotiating).

The court of appeals' limitations would undercut Title VII most significantly with respect to jobseekers. A number of religions have garb and grooming requirements that some employers may readily identify as religious practices. See Religious Orgs. Pet. Stage Amicus Br. 7-9 (discussing Muslim, Sikh,

Christian, and Jewish practices). Employers who observe these practices will know whether they conflict with the employer's own expectations for garb and grooming. Yet at the application stage, jobseekers will often not know all of an employer's work rules. Accordingly, applicants may be poorly situated to identify a conflict with work rules that the prospective employer readily perceives. Permitting an employer to decline to hire job applicants based on their perceived religious practices, in these circumstances of informational asymmetry, would significantly undercut Title VII protections at the initial, critical stage of the employment process.

B. The Reasons Offered By The Court Of Appeals Do Not Justify Its Narrow Construction Of Title VII

None of the reasons offered by the court of appeals justifies the court's limitations on the scope of Title VII protections.

1. Neither precedent nor policy considerations support the court's approach

The court of appeals appears to have rested its decision in substantial part on its own prior precedent setting out a burden-shifting approach to religious accommodation claims based on *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). See Pet. App. 30a-33a (discussing prior cases that stated employee's prima facie case required showing that "he or she informed his or her employer of" their religious belief). But whether or not the court of appeals correctly read its earlier decisions, cf. *id.* at 76a-79a (Ebel, J., concurring in part and dissenting in part), nothing in this Court's jurisprudence supports imposing a rigid notice requirement because a burden-shifting frame-

work is used. Burden-shifting frameworks do not impose requirements beyond those in the statute. They are instead "merely a sensible, orderly way to evaluate the evidence * * * as it bears on the critical question of discrimination." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978); see also *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981) (explaining that burden-shifting framework "serves to bring the litigants and the court expeditiously and fairly to [the] ultimate question" in the case). Thus, if Title VII does not by its terms condition protections on direct, explicit notice from an employee giving rise to actual knowledge—and it does not—no part of *McDonnell Douglas* supports imposing such a requirement.

The court of appeals next suggested that limiting Title VII protections to those job applicants who have provided their employers with direct notice of a religious conflict is appropriate because applicants have superior knowledge of whether their particular practices are religious. See Pet. App. 46a-53a (emphasizing that whether a practice is religious depends on employee's subjective reasons for a particular practice). That reasoning is flawed. Knowledge of the need for an accommodation requires an understanding not simply of an applicant's religious practices but also of company policies. The employer almost uniformly has superior knowledge of the latter. Thus, in some cases, only the employer will perceive a conflict between religious practice and work rules. Here, for instance, while the supervisor in charge of hiring for respondent's store correctly understood there to be a conflict between respondent's work rules and Elauf's religious practices, Elauf was unaware of any conflict.

See *id.* at 75a-76a (Ebel, J., concurring in part and dissenting in part). It thus makes little sense to place deliberate religious discrimination outside the ambit of Title VII based on a superior-knowledge theory.

Nor was the court of appeals correct to suggest that an explicit, direct notice requirement is required to avoid unseemly employer inquiries into religious practices. See Pet. App. 53a-54a. Because applicants' religions are generally not relevant to their job qualifications, the EEOC discourages employers from inquiring as to job applicants' religious beliefs as a general matter. See *ibid.* But after an employer has received sufficient information about an applicant's beliefs to be on notice of a potential religious conflict, the EEOC does not discourage employers from making limited inquiries to confirm the need for an accommodation. See *EEOC Compliance Manual* § 12-I-A-3, at 628.0003; *id.* § 12-IV-A-2, Exs. 30 and 31, at 628:0022-:0023. To do so, an employer who suspects a possible religious conflict can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would have difficulty complying. See generally EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace*, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last modified July 23, 2008); *EEOC Compliance Manual* § 12-IV(A), at 628:0028. Accordingly, concern about the prospect of routine inquiry into religious faith does not support limiting Title VII protections.

2. EEOC guidance does not support the decision below

Finally, the court of appeals erred in relying on isolated statements in previously issued EEOC guidance materials to support its conclusions. See Pet.

App. 55a-68a. Statutory text, precedent, and purposes make plain Title VII's applicability to intentional discrimination based on protected attributes. To the extent that recourse to agency views is appropriate, however, the proper framework is to determine whether the agency's view—as articulated in this case—warrants a measure of deference under the framework of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). See *Vance* v. *Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013); *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008).[2] Under the *Skidmore* framework, whether an agency's view warrants deference "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." 323 U.S. at 140.

The EEOC has construed Title VII—here and elsewhere—to eschew any requirement of notice based on actual knowledge, obtained through explicit statements directly from an employee. EEOC C.A. Br. 34; EEOC D. Ct. Opp. to Resp's Mot. for Summ. J. 11-12; see EEOC Mem. in Opp. to Def's Mot. For Summ. J. 14-15, *EEOC* v. *GKN Driveline N. Am., Inc.*, 1:09CV654, 2010 WL 5093776 (M.D.N.C. 2010) (stating that "an employee need not explicitly ask for a religious accommodation" and that notice is sufficient if the employer has "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the

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[2] Congress did not vest the EEOC with the authority to enact substantive rules or regulations under Title VII. See *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); cf. 42 U.S.C. 2000e-12(a) (conferring authority on the EEOC to issue "procedural regulations").

employee's religious practice and the employer's job requirements") (citation omitted). The EEOC has also taken this approach in interpreting the analogous accommodation provision in the Americans With Disabilities Act. See, *e.g.*, EEOC Br. at 10-23, *Freadman* v. *Metropolitan Prop. & Cas. Ins. Co.*, 484 F.3d 91 (1st Cir. 2007) (No. 06-1486) (arguing that employer's obligation begins when employer becomes aware of employee's disability); EEOC Reply Br. at 16, *EEOC* v. *Agro Distrib. LLC*, 555 F.3d 462 (5th Cir. 2009) (No. 07-60447) (explaining that key issue with respect to notice is "whether the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.") (quoting *Taylor* v. *Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)); see also Pet. App. 69a (noting ADA's "analogous reasonable-accommodation scheme").

The EEOC also rejected a requirement of explicit, direct notice under Title VII in detailed written guidance in March 2014. See EEOC, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited Dec. 3, 2014) (*Garb and Grooming*); see also EEOC, *EEOC Issues New Publications on Religious Garb and Grooming in the Workplace* (Mar. 6, 2014), http://www.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm. The guidance explains that "[i]n some instances, even absent a request" from an employee to accommodate a religious practice, "it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed." *Garb and Grooming* Q&A 7. It

offered as an example a circumstance in which an employer correctly understood a job applicant's headscarf to be religious; presumed she would wear that headscarf at work; and declined to hire the applicant as a result. *Id.* Q&A 7, Ex. 7. In that circumstance, "because the employer believed [the applicant's] practice was religious and that she would need accommodation," the employer was not unilaterally free under Title VII to refrain from hiring her based on her religious practice. *Ibid.*

Contrary to the view of the court of appeals, these articulations are consistent with prior, less detailed guidance. The EEOC's compliance manual, on which the court of appeals relied, see Pet. App 56a, states that an employer's duties under Title VII arise in any case in which the employer is "on notice" that an employee's "sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship." *EEOC Compliance Manual*, § 12-IV Overview, at 628:0020. And while the manual emphasizes that an employee cannot simply assume that the employer will understand a practice to be religious, *id.* § 12-IV(A)(1), at 628:0020, see Pet. App. 56a, it offers examples of adequate notice that do not involve explicit statements of the employee, see *EEOC Compliance Manual* § 12-IV(A)(1) n.120, at 628:0021.

The guidance in EEOC's interpretive regulations—though less explicit—is consistent with the agency's position. The interpretive regulations provide that an employer may not "fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship in the

conduct of its business." 29 C.F.R. 1605.2(b)(1). That blanket prohibition does not suggest that an employer may under any circumstance fail to accommodate what it understands to be a religious practice, absent a showing of undue hardship. The court of appeals did not address that portion of the EEOC's guidance, and instead relied on a portion of a sentence in the subsection entitled "[r]easonable accommodation." But the court misunderstood the provision it cited. The "reasonable accommodation" section is devoted to explaining the work-rule modifications that are required when an employer has a duty under Title VII, rather than to explaining when an employer has a duty of accommodation at all. 29 C.F.R. 1605.2(c); cf. 29 C.F.R. 1605.2(b)(1) (setting out when employer has "[d]uty to accommodate"). It states that "[a]fter an employee or prospective employee notifies the employer * * * of his or her need for a religious accommodation," the employer "has an obligation to reasonably accommodate the individual's religious practices," 29 C.F.R. 1605.2(c)(1), before describing the scope of "reasonable" accommodations, 29 C.F.R. 1605.2(c)(1) and (2). The guidance thus specifically describes what accommodations are reasonable after an employer's duty to accommodate is triggered by a particular kind of notice—likely the most common kind. But it does not by its terms limit an employer's duty to that subset of cases.

C. The Decision Below Should Be Reversed

The court of appeals erred in awarding summary judgment to respondent on notice grounds. On the undisputed facts in this case, it is clear that assistant manager Heather Cooke failed or refused to hire Elauf on behalf of respondent, based on Elauf's head-

scarf, despite Cooke's correct understanding that the headscarf represented a religious practice.

First, there is no material dispute of fact that Heather Cooke, as the person responsible for hiring at the Abercrombie Kids store to which Elauf applied, "fail[ed] or refuse[d] to hire" Elauf as an agent of respondent. 42 U.S.C. 2000e-2(a)(1); see also 42 U.S.C. 2000e(b) (defining "employer" to include "any agent" of the employer). Cooke sought guidance from higher-level managers regarding the meaning and application of respondent's policies, including, here, guidance regarding whether Elauf's headscarf was compatible with respondent's Look Policy. See J.A. 55-56 (Cooke explaining practice of consultation with superiors); J.A. 101 (Cooke explaining that Johnson decided Elauf was not qualified for a job based on her headscarf). But Cooke was ultimately responsible for making hiring decisions regarding particular employees—and she was the person who would ultimately extend or not extend an offer. See J.A. 53, 54 (Cooke explaining she was "in charge of hiring" store employees); J.A. 55 (Cooke agreeing that she made "the final decision on whether an applicant for a model position would be hired"); see also J.A. 56 (Cooke agreeing that she had the authority to make job offers); J.A. 133 (Johnson explaining that decisions regarding hiring for non-managerial positions were "solely * * * the store manager's responsibility" and that Cooke was the "HR manager [f]or the Abercrombie Kids store"). In sum, as the district court properly found, Cooke "had responsibility for hiring decisions at the Abercrombie Kids store." Pet. App. 117a n.10.

Second, there was no dispute that when Cooke "fail[ed] or refuse[d] to hire" Elauf for a position in

respondent's store, 42 U.S.C. 2000e-2(a)(1), she did so based on Elauf's practice of wearing a headscarf, which Cooke correctly understood to be a religious practice. To be sure, Cooke and Johnson gave different accounts regarding the information that Cooke conveyed to Johnson in discussing Elauf's hijab.[3] But there was no dispute of fact concerning Cooke's correct understanding. As Cooke explained, after seeing Elauf wearing a headscarf on multiple occasions at the mall and during the interview, Cooke correctly inferred that Elauf was a Muslim, and "figured that was the religious reason why she wore her headscarf." Pet. App. 7a (citation omitted); see also J.A. 77. Thus, there is no dispute of material fact that Cooke failed and refused to hire Elauf for respondent based on what Cooke correctly understood to be a religious practice. Because undisputed facts establish that an agent of respondent failed to hire Elauf based on what the agent correctly understood to be Elauf's religious practice, the EEOC was entitled to summary judg-

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[3] Cooke described discussing with Johnson her understanding that the headscarf reflected Islamic religious practice; described how Johnson rejected a religious exception on the ground that it would lead to spurious claims for religious accommodation by, for instance, "someone [who] can come in and paint themselves green and say they were doing it for religious reasons"; and described Johnson's rejection of her argument that a different result should apply for recognized religious practice. See J.A. 87. Johnson asserted that no discussion of the religious nature of Elauf's headscarf occurred. J.A. 146. Johnson testified that he recommended that Elauf not be hired as a result of her headscarf, without any inquiry into whether she could simply take the headscarf off, J.A. 140-141—notwithstanding that respondent does not require applicants to be in compliance with the Look Policy during a job interview, Pet. App 94a.

ment concerning the notice element of its claim.[4] Since the court of appeals did not decide whether EEOC was also entitled to summary judgment with respect to its showings of Elauf's bona fide religious belief and with respect to an undue hardship defense, the case should be remanded for the court of appeals to consider those questions in the first instance.

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[4] Cooke's correct understanding, as an agent of respondent, would suffice here even if, contrary to the record evidence, Cooke had lacked hiring authority. First, under the agency law principles that this Court has explained should inform Title VII jurisprudence, see *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754 (1998), notice is properly imputed to a principal from an agent acting in the scope of her employment duties—as Cooke was here. See Restatement (Second) Agency §§ 272, 275, at 591, 598 (1958). Second, this Court has recognized that an employer may be liable for discriminatory actions proximately caused by a supervisor who possesses the requisite mental state—even if a final employment decision is made by a "technical decisionmaker" who lacks the relevant mens rea. See *Staub*, 131 S. Ct. at 1192.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
IAN HEATH GERSHENGORN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
JENNIFER S. GOLDSTEIN
Acting Assistant General Counsel
JAMES M. TUCKER
Attorney
U.S. Equal Employment Opportunity Commission

DECEMBER 2014

STATUTORY AND REGULATORY PROVISIONS

1. 42 U.S.C. 2000e provides in pertinent part:

Definitions

For the purpose of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to

reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

* * * * *

2. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *.

* * * * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * * *

3. 42 U.S.C. 2000e-12(a) provides:

Regulations; conformity of regulations with administrative procedure provisions; reliance on interpretations and instructions of Commission

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of title 5.

4. 29 C.F.R. 1605.2 provides in pertinent part:

Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.

* * * * *

(b) *Duty to accommodate.* (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

* * * * *

(c) *Reasonable accommodation.* (1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization

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[2] *See Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).

has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

* * * * *

(e) *Undue hardship.* (1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demon-

strate that the accommodation would require "more than a *de minimis* cost".[4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

* * * * *

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[4] *Hardison, supra*, 432 U.S. at 84.

No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT

Mark A. Knueve
Daniel J. Clark
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay St.
P.O. Box 1008
Columbus, OH 43216

Shay Dvoretzky
Counsel of Record
Eric S. Dreiband
Yaakov M. Roth
Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

QUESTION PRESENTED

The question originally presented by Petitioner was whether an employer can be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

The question now actually presented by Petitioner's brief is whether an employer engages in *intentional* religious discrimination by enforcing a *religion-neutral* employment policy against an employee or applicant if the employer correctly assumes that the individual's non-compliance is motivated by religion.

RULE 29.6 STATEMENT

Respondent Abercrombie & Fitch Stores, Inc.'s parent corporation, Abercrombie & Fitch Co., is a publicly traded company. No other publicly held corporation owns 10% or more of Respondent's stock.

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STATEMENT

Respondent Abercrombie & Fitch Stores, Inc. ("Abercrombie"), like many retailers, maintains comprehensive dress and grooming standards that generally apply to all customer-facing employees. Abercrombie declined to hire Samantha Elauf because she wore a headscarf that did not comply with these religion-neutral standards, known as the Look Policy. The EEOC claims that Abercrombie thereby engaged in *intentional* religious discrimination under Title VII, entitling the EEOC to monetary damages.

A. Title VII Distinguishes Intentional Discrimination from Neutral Employment Policies That Burden Protected Traits.

Title VII provides that it is an "unlawful employment practice" for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

1. This Court has long understood Title VII to prohibit two distinct types of discrimination. *First*, and "most easily understood," the statute prohibits adverse actions that are taken with "discriminatory motive," *i.e.*, when the employer's subjective intent is to "treat[] some people less favorably than others because of their race, color, religion, sex, or national origin." *Int'l B'hood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Such intent-based discrimination is known as disparate treatment, or intentional discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

Second, this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), concluded that Title VII also proscribes certain employment actions with discriminatory *effects*, even absent intent to treat the protected group differently. *See id.* at 430-32. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation," the Court held, and so policies "neutral on their face, and even neutral in terms of intent," still violate Title VII if they burden a protected attribute and are not justified by the employer's "business necessity." *Id.* That theory of discrimination, which Congress codified by adding to Title VII a special proof framework, 42 U.S.C. § 2000e-2(k), is known as adverse or disparate impact, because of its focus on the effects of the employer's policy, rather than the employer's intent.

This Court has "consistently recognized" the distinction between the two theories, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003), which call for distinct evidentiary frameworks, allow for distinct defenses, and perhaps most importantly, trigger

distinct remedies. In the Civil Rights Act of 1991, Congress amended Title VII to allow compensatory and punitive damages, but only in cases of "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)." 42 U.S.C. § 1981a(a)(1). For the latter, only equitable remedies like backpay, reinstatement, and injunctive relief are available. *Id.* § 2000e-5(g).

2. One of the protected attributes under Title VII is "religion." The statute provides that "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

In keeping with the general dichotomy of Title VII claims, courts have understood these religious discrimination provisions to prohibit two distinct types of conduct. *First*, Title VII prohibits an employer from treating employees of one religion differently from similarly situated employees of another religion (or no religion). Nor may an employer treat certain religious practices differently from similarly situated practices of other faiths (or secular practices). Either would be "straightforward disparate treatment." *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1037 (10th Cir. 1993); *see also, e.g., Endres v. Ind. State Police*, 334 F.3d 618, 626 (7th Cir. 2003) (allegedly selective enforcement of workplace ban on headwear against only religious hats, but not secular hats).

Second, when a neutral employment policy would have adverse *effects* on a religious practice, even absent any discriminatory intent, courts require employers to offer exemptions, or accommodations, if doing so would not impose undue hardship. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 & n.1 (1986). According to the EEOC, such a "religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally." *EEOC Compliance Manual*, No. 915.003 § 12-IV (July 2008) ("*Compliance Manual*"), http://www.eeoc.gov/policy/docs/religion.html. "An individual alleging denial of religious accommodation," by contrast, "is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion." *Id.*

B. The EEOC Instructs Employees To Ask for Religious Accommodations, Not To Wait for Employers To Offer.

Accommodating religious practices is not always straightforward, in large part because it can be hard to tell who wants or needs accommodation. Religion is "uniquely personal and individual" (Pet.App.48a), and what ultimately matters is if the employee personally engages in a practice for religious reasons—whether the practice is maintaining a beard; observing a day of rest; wearing a head covering, a nose ring, or other jewelry; or myriad other practices that may or may not be religiously motivated. Moreover, an employee need not belong to a well-known or recognized religion to claim protection, 29 C.F.R. § 1605.1, and Title VII's protections apply even if other members of the faith disagree about its requirements.

The EEOC's regulations and guidance have long reflected this difficulty, by acknowledging that it is generally the employee's or applicant's duty ask for an accommodation—not the employer's job to guess. Its regulations thus state that "[*a*]*fter* an employee or prospective employee [has] notif[ied] the employer ... of his or her need for a religious accommodation," the employer has an "obligation to reasonably accommodate." *Id.* § 1605.2(c)(1) (emphasis added). And its Compliance Manual similarly instructs:

> An applicant or employee who seeks religious accommodation *must* make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it.

Compliance Manual, § 12-IV.A.1 (emphasis added).[1]

Employers are not supposed to ask about religious views or practices. "Questions about an applicant's religious affiliation or beliefs ... are generally viewed as non job-related and problematic under federal law." EEOC, *Pre-Employment*

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[1] After the Tenth Circuit rendered its decision below, the EEOC issued a new technical assistance publication stating a very different standard. (*See* Govt.Br.32.) *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm ("*Religious Garb Guidance*"). It says that employers must make applicants or employees aware of workplace rules before the latter have a duty to request accommodation, and provides examples modeled after this case. *See id.* Exs. 7, 11.

Inquiries and Religious Affiliation or Beliefs, ("*Pre-Employment Inquiries*"), http://www.eeoc.gov/laws/practices/inquiries_religious.cfm. Employers should thus "avoid assumptions or stereotypes about what constitutes a religious belief," and managers "should be trained not to engage in stereotyping based on religious dress and grooming practices." EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace* ("*Best Practices*"), http://www.eeoc.gov/policy/docs/best_practices_religion.html.

C. Abercrombie Thrives Because of Its Strong Brand Identity.

Abercrombie runs a family of clothing stores that market three clothing brands to three audiences. The original store, Abercrombie & Fitch, sells rugged casual wear modeled after the preppy look of the Ivy League to older high school and college students, while abercrombie kids offers a similar look to pre-teens and middle schoolers. The third store, Hollister, sells casual clothing inspired by Southern California to high schoolers. JA179-80.

These target demographics are tough customers. Even after a company attracts them, it must retain them through the vicissitudes of teen and young adult fashion. And even if it successfully retains them, it does so only for a limited time; by definition, they soon age out of the demographic, replaced by new customers, often with distinct tastes. JA169; JA171-72. On top of this, youth clothing retailers face intense market competition. JA161.

To stand out, apparel retailers rely on the strength of their brands. Young customers express their developing sense of self by purchasing from clearly identified brands. JA164; JA167-69. And by

maintaining strong brands, retailers can attract customers more likely to make purchases, pay a premium when doing so, and recommend products to others. JA164-65. To work, though, brand identities must be carefully maintained and consistently presented. JA176-78. Today's young customers are the most brand-conscious in history. JA169-71. Messages that deviate from a brand's core identity weaken the brand and reduce its value. JA173-74.

Unlike many competitors, Abercrombie does very little traditional advertising. JA44-45; JA156; JA240-41. Instead, it focuses almost entirely on creating a unique in-store experience. Everything from distinct lighting and custom fragrances to specifically chosen music is designed to transport the customer from a "generic mall" to a location reflecting the brands' styles, be it a prep school hangout (for abercrombie kids), the Huntington Beach Pier (for Hollister), or a club (for Abercrombie & Fitch). JA190-92. Abercrombie has thrived in a competitive market by harnessing the power of its carefully managed brands.

D. Abercrombie Protects and Promotes Its Brand Through Its Look Policy.

As courts have recognized, "the appearance of a company's employees may contribute greatly to the company's image and success with the public." *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985). Indeed, Abercrombie's employees stand at the center of its efforts to create a strong in-store brand experience. JA199-200. As one executive explained, when customers walk into the store, "the first part of [Abercrombie's] advertising" (JA240-41), is to ensure that they see floor associates, referred to as Models,

who "project[] and protect[] the image of the brand through personal style" (JA105).

To ensure consistent brand messaging, Abercrombie has adopted the detailed dress and grooming standards contained in the Look Policy. The Look Policy requires employees to "wear clothes that are similar to the Abercrombie & Fitch brand." JA124. It also contains a host of more specific proscriptions. For example, it prohibits facial hair, obvious tattoos, and long fingernails, and it sets forth guidelines regarding how employees may style their hair and wear their makeup. JA125-27. At the time in question here, the Look Policy also explained that "[e]ven though A&F sells caps, they are considered, too informal for the image we project. Caps are not allowed to be worn on the sales floor." JA127. That policy, one executive explained, "extends beyond caps to apply to all headgear" (JA205), in keeping with the general rule that employees may only wear clothing similar to what Abercrombie sells.

The Look Policy is crucial to Abercrombie's success (JA203-206), and complying with it is an important part of a Model's job (JA220-21). The job description provides that Models will "represent[] the brand" by "[c]reat[ing] a fun and engaging environment," "upholding Abercrombie's vision and standards," and "[a]dher[ing] to Abercrombie guidelines in personal appearance." JA106. In addition, the Model Group Interview Guide instructs interviewers to assess whether a candidate will "wear[] clothes that fit the brand and set[] the example of the brand lifestyle." JA112; *see also id.* (assessing whether candidates wear "clothes ... that are consistent with the Abercrombie brand").

During the time in question, at the end of every interview, the Abercrombie manager would read a description of the Look Policy, informing applicants that they must wear clothing similar to what Abercrombie sells and otherwise follow specific dress and grooming guidelines. The manager would also ask if applicants have any questions about the Look Policy. JA32-33; JA63-64.

Notwithstanding the importance of the Look Policy, Abercrombie has established procedures to offer limited exceptions where doing so would not cause undue hardship. Rather than train the managers "in any of [its] 1,100 stores" "to be H[uman] R[esources] experts," Abercrombie instructs them that if an applicant or employee requests an accommodation, or if a store manager has an accommodation-related question, the manager should call Abercrombie's H.R. professionals using a special hotline. JA46-47. Those professionals evaluate the request and "try to find some way to make the accommodation," provided that one can be offered "without undue burden; i.e., taking us off brand." JA50. Abercrombie has granted religious exemptions over the years to employees who have requested them, including to Muslim employees (D.Ct. Dkt. 68-7, at 12-33), after "evaluat[ing] them on a case-by-case basis" to ensure that it grants reasonable requests while still being "careful ... about the brand and [its] marketing" (JA247-48).

E. Abercrombie Declined To Hire Elauf Because She Did Not Comply with Its Look Policy or Request Accommodation.

In 2008, Samantha Elauf applied for a Model position at an abercrombie kids store. JA19-20.

While some women wear headscarves for non-religious cultural or political reasons (JA236-38), or simply as a style preference, Elauf wears one for religious reasons (JA18). She knew, however, that Abercrombie expects its employees to wear clothing similar to the clothes it sells; as Elauf's friend Farisa Sepahvand, herself an Abercrombie employee at the time, put it, "[i]t's kind of common sense. ... [W]hen you go in the store, everyone's ... wearing polos and regular jeans and white Converse." JA255; *see also* JA23. Accordingly, before applying, Elauf asked Sepahvand whether she could work at Abercrombie and wear a headscarf. JA23; JA26-27.

Sepahvand asked one of the store's assistant managers, who stated that he thought it should be "okay," provided that the headscarf was not black; Abercrombie did not sell black clothes, so it generally did not permit employees to wear them. JA40-41; JA253-54. Sepahvand, in turn, told Elauf that she could not wear a black headscarf. JA26-27. Elauf knew that Abercrombie also did not generally sell headscarves. JA37-38.

When Elauf applied for a Model position, she met with another one of the store's assistant managers, Heather Cooke. JA26. Despite Sepahvand's advice, Elauf wore a black headscarf to the interview, similar to the ones depicted in the photographs of Elauf found at JA130-31. JA75-76. Unlike the hijabs frequently worn by devout Muslim women, Elauf's headscarves do not cover her neck and are not tightly bound. JA17-18. Indeed, she generally purchased her scarves—the sort that women might wear as a fashion statement—at ordinary clothing stores in the mall. JA37.

Cooke followed Abercrombie's Model Group Interview Guide. JA63; JA109-120. Cooke "knew that head wear and black items were prohibited by" the Look Policy (JA104), but she did not ask Elauf about headscarves in general or black ones in particular, since the standard script did not include such questions (JA80-81). Elauf also made no mention of her headscarf, and neither she nor Cooke mentioned religion. JA31; JA33; JA78-79. At the end of the interview, Cooke read the Interview Guide's description of the Look Policy, informing Elauf that employees had to "wear clothing that ... looked like Abercrombie" and follow other dress and grooming guidelines. JA33; JA100-101. Despite being prompted, Elauf asked no questions. JA31-32.

Cooke "had never interviewed anybody that wore a head scarf." JA79. While she ordinarily had authority to hire employees, she was supposed to ask her store or district manager if she "had a question about something"—including the Look Policy—in the hiring process. JA55-56; *see also* JA79 (Cooke had asked her store manager about other forbidden items such as tattoos or piercings after other interviews).

Cooke accordingly contacted Randall Johnson, her district manager, to "ask" for "[his] permission" to hire Elauf despite her headscarf. JA140. Cooke—who "did not" then "*know*" Elauf's religion—"assume[d]" she was Muslim, and "figured" she wore her headscarf for religious reasons. JA76-77; JA102 (emphasis added). According to Johnson, Cooke did not share her belief that Elauf wore the headscarf for religious reasons; he otherwise would have "roll[ed] [the issue] up to HR" in accordance with his training. JA146. Cooke testified, though, that she told

Johnson she "believe[d]" the headscarf was religious. JA87. Either way, both agreed that Johnson instructed Cooke not to hire Elauf. In Cooke's words, Johnson "told [her] not to hire [Elauf] because she had a head scarf." *Id.* As Johnson put it, he told Cooke that "[y]ou cannot hire her" because "she's not compliant with [the] dress code." JA134; JA140.

Johnson further testified that he would have taken the same action with respect to any headwear, whether a headscarf, a yarmulke, a hat, a ball cap, or a helmet, because each conflicted with the Look Policy. JA144. Johnson made no disparaging remarks about Elauf, Islam, or the headscarf during the conversation or at any other time. JA89.

Although Cooke still wished to hire Elauf, she followed Johnson's order and did not do so. JA91.

F. The District Court Granted Summary Judgment Against Abercrombie on the EEOC's Failure-To-Accommodate Claim.

The EEOC sued Abercrombie on Elauf's behalf, seeking money damages as well as injunctive relief. Compl., D.Ct. Dkt. 2, ¶¶A-E. It did not claim that Abercrombie or its employees harbored animus toward Muslims or that the Look Policy was a pretext for discrimination against Muslims. Rather, it contended that Abercrombie "failed to accommodate [Elauf's] religious beliefs by making an exception to the Look Policy." *Id.* ¶6.

The district court granted partial summary judgment on liability to the EEOC, denying Abercrombie's cross-motion. Pet.App.92a-120a. It applied the framework from *Thomas v. National Association of Letter Carriers*, 225 F.3d 1149 (10th

Cir. 2000), which requires the plaintiff to show, in an accommodation case, that she "had a bona fide religious belief that conflicts with an employment requirement," "informed the employer of this belief," and "was not hired for failing to comply with the employment requirement." Pet.App.108a-109a.

Focusing primarily on the notice requirement, the court held the EEOC had made its *prima facie* case. On the district court's view, an employer has sufficient notice if it "has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." Pet.App.115a. Because it was supposedly "undisputed" that "Cooke knew [Elauf] wore the head scarf based on her religious belief," the court found adequate notice here and imputed it to Abercrombie. Pet.App.117a & n.10. The court also rejected Abercrombie's undue hardship defense, which was based on the importance of its branding, because Abercrombie had supported its defense with expert testimony but not *statistical* proof that exceptions to the Look Policy would hurt its sales. Pet.App.118a-120a. Abercrombie had also allowed limited exceptions, the court noted. Pet.App.119a.

At a trial on remedies, the jury awarded $20,000 in compensatory damages but no punitive damages. The EEOC did not receive any injunctive relief. Pet.App.12a. Abercrombie appealed; the EEOC did not cross-appeal as to remedies. *Id.*

G. The Tenth Circuit Reversed.

The Tenth Circuit reversed and ordered that summary judgment be granted for Abercrombie. Treating the claim as a "religious accommodation

claim," which is "distinct from a disparate treatment claim" (Pet.App.23a), the court applied the same framework as the district court. It held, however, that to be liable for failure to accommodate, the employer must at least have had "*actual* knowledge of the key facts that trigger its duty to accommodate," namely that the employee's practice was religious. Pet.App.34a, 39a. And, "ordinarily," the court elaborated, that means the plaintiff must have informed the employer of the conflicting religious practice. Pet.App.28a.

That conclusion, the court explained, was consistent with most courts' formulation of the notice requirement. Pet.App.30a-31a (collecting cases). It also made sense because Title VII protects only those who want accommodation for religiously motivated practices. Thus, "the key questions that determine whether an employer has an obligation under Title VII to provide a reasonable religious accommodation ordinarily are only within the ken of the applicant or employee," no matter what appearances might suggest. Pet.App.46a; *see also* Pet.App.46a-53a. The court reasoned that employers should not be induced to stereotype or pry into employees' religious lives to identify possible conflicts with neutral work rules, which would be the inevitable result of the EEOC's position. Pet.App.54a-55a.

Moreover, the EEOC's own materials "repeatedly, expressly, and unequivocally ... assign the notice responsibility to the applicant or employee." Pet.App.55a-58a (citing 29 C.F.R. § 1605.2(c)(1); *Compliance Manual*, § 12-IV.A.1; *Best Practices*). The court rejected the EEOC's request for deference to its contrary understanding of its regulation under

Auer v. Robbins, 519 U.S. 452 (1997), because the EEOC's new position conflicted with the regulation's text, departed from prior statements, and provided insufficient notice to employers. Pet.App.58a-68a.

The court also compared its understanding of the notice requirement to the analogous requirement under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). Courts have held that an employee must "make clear" that he "wants assistance" for his disability before an ADA accommodation duty attaches. Pet.App.69a; *see* Pet.App.69a-70a (collecting cases). And the EEOC agrees: The "process of determining the appropriate reasonable accommodation" begins "[o]nce an individual with a disability has requested" one, 29 C.F.R. § 1630, App.; as such, "the obligation [to ask] generally rests with the employee," EEOC, *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities* (Sept. 2008), http://www.eeoc.gov/facts/performance-conduct.html.

Here, Elauf never identified her headscarf as religious, nor did Abercrombie have actual knowledge of that fact from any other source. Pet.App.28a, 39a-40a. Notably, Cooke "did not know" Elauf's religion, but only "*assumed*" she was Muslim and "*figured*" that was the reason for her headscarf. Pet.App.40a. Given the personal nature of religion, Cooke could not have *known* from seeing Elauf that she wore the headscarf for that reason. Pet.App.41a. Nor did it matter that her assumption proved correct. An employer cannot know if an assumption is correct without asking the employee. Thus, on the EEOC's view, employers would be forced to probe suspected

religious beliefs or risk a lawsuit. Pet.App.41a n.9. Finally, because Cooke lacked actual knowledge, so did Johnson, who could only have learned as much about Elauf as Cooke knew. Pet.App.42a-44a.

Judge Ebel dissented in part, reasoning that some plaintiffs can state a claim by showing that they were not aware of a work rule that conflicted with their religious practice, their employer knew they "might hold" conflicting religious beliefs, and the employer refused to hire them because of that practice. Pet.App.81a-82a. He concluded, however, that factual disputes, including on Abercrombie's undue hardship defense, precluded summary judgment for the EEOC. Pet.App.90a-91a & n.12.

The Tenth Circuit denied rehearing en banc (Pet.App.122a), and this Court granted certiorari.

SUMMARY OF ARGUMENT

The EEOC's original question presented asked whether an employer who declines to hire an applicant based on her "religious practice" violates Title VII's religious discrimination provisions even if the employer did not have "actual knowledge" that the practice was in fact religious. That scenario arises if the applicant's religious practice conflicts with a neutral workplace rule but the applicant (for whatever reason) does not identify the conflict or ask for accommodation. The employer in that case would not know that the non-compliant conduct is motivated by religious belief. Does refusal to hire that applicant violate Title VII?

I. The EEOC's answer in this Court, markedly different from its approach below or in its petition, is that such an employer is liable on a *disparate-treatment* theory of discrimination, so long as it "correctly" assumed that the applicant's practice was religious in nature. On that view, an employer that enforces a *neutral* workplace rule in the face of such an assumption is *intentionally discriminating* based on religion. The EEOC says that Abercrombie thus subjected Elauf to *disparate* treatment "because of" her religion by subjecting her to the *same* policy as non-religious applicants or employees who wear head coverings for cultural, political, or aesthetic reasons.

That is a bizarre position. This Court's decisions could hardly be clearer: Intentional discrimination occurs when a decision is made *because of*, not *in spite of*, the protected trait. A decision that is not *motivated by* the protected trait does not become intentionally discriminatory simply because the employer is *aware of its effects* on someone with the

trait. Thus, an employer who enforces a neutral policy with incidental effects on a religious practice—and would have applied the same policy even if the practice were secular—is not engaged in disparate treatment based on religion. Put another way, neither a "correct understanding" nor even "actual knowledge" that a practice is religious suffices for intentional discrimination; only *intent* does.

Of course, Title VII's religious discrimination provisions—just like Title VII in general—proscribe more than just intentional discrimination. A claim may instead attack the discriminatory effects of an employer's policy, what lower courts and the EEOC have called a failure-to-accommodate theory. Indeed, the lower courts analyzed this case on that conceptually and doctrinally distinct theory, and this Court granted review on the same understanding.

But the EEOC in its brief has now abandoned that accommodation theory in favor of a disparate-treatment claim. It had no choice, because the only remedy at issue here is compensatory damages—relief only available for intentional discrimination. The EEOC is thus forced to take the position that an employer engages in disparate treatment by treating religiously motivated violations of neutral work rules *the same* as secular violations, rather than granting favored treatment to religion. Since this untenable intentional-discrimination claim is the only one advanced in this Court and the only one upon which relief could be granted, the judgment below should be affirmed; there is no basis to determine here the parameters of, or circumstances triggering, a distinct Title VII duty to affirmatively accommodate religion.

II. If this Court were to reach that issue, however, it should hold that only *actual* knowledge of a religious conflict, not a mere *guess*, gives rise to Title VII liability, and it should affirm for that reason.

That has been the established rule for over forty years: Employees and applicants have told employers if they need religious accommodations, eliminating any need to speculate, guess, or probe. Indeed, that is how the EEOC itself directed that accommodation discussions should begin, and it is how the ADA duty to accommodate disabilities is triggered. This is not some technical "magic words" requirement, just a recognition that *someone* must initiate the request, and that employees are usually better suited to do so. The EEOC objects that *some* applicants may not be, if they are unaware of the conflicting work rules, but that attenuated hypothetical (which is not presented here or in any other cited case) is no reason for a general rule shifting the burden to employers, particularly given the host of counterproductive consequences of such a regime. Imposing duties on employers whenever they "suspect" any "possible" conflict with religion (Govt.Br.21) has no basis in Title VII or any caselaw. It would also subject employers to an unfair Catch-22 and induce the very stereotyping that Title VII is meant to prevent, as employers attempt to avoid litigation by preemptively probing the suspected religious views of their employees.

III. At a minimum, factual disputes over the actual decisionmaker's true "understanding" here mean that, even if the Court accepts the EEOC's novel legal rule, it should remand for trial, rather than grant partial summary judgment to the EEOC.

ARGUMENT

I. THE EEOC CANNOT SHOW INTENTIONAL DISCRIMINATION, BUT MUST DO SO TO JUSTIFY THE SOLE RELIEF AT ISSUE HERE.

In this Court, the EEOC for the first time presents its theory as "intentional discrimination" or "disparate treatment." (Govt.Br.19.) It has no choice: That is the only claim that allows for compensatory damages, the sole relief at issue here, as opposed to backpay, reinstatement, or an injunction. 42 U.S.C. § 1981a(a)(1). But an employer who fails to make an *exception* to a *neutral* workplace rule is inherently not engaged in disparate treatment, which occurs when people are treated *differently* due to religion. Here, the EEOC alleges only that Abercrombie treated Elauf's religious headwear the *same* as non-religious headwear. To be sure, Title VII may require exemptions to a neutral policy burdening religion (subject to applicable defenses). But such a failure to accommodate religion is not *intentional* discrimination—as this Court, all the lower courts, Congress, and the EEOC itself have long recognized.

A. The EEOC Must Establish Intentional Discrimination To Obtain Reversal Here.

As this case comes to this Court, compensatory damages are the only relief at stake. The EEOC did not seek backpay because Elauf obtained a different job days after Abercrombie declined to hire her. D.Ct. Dkt. 151, at 2. The EEOC's request for an injunction was denied (Pet.App.12a), and the EEOC did not cross-appeal, so that relief was "not properly before the Court of Appeals." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999). Only the compensatory damages award was at issue on appeal.

To justify reversing the Tenth Circuit's judgment, the EEOC must accordingly invoke a theory allowing such damages, or else that court was correct to dismiss the EEOC's claim. *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) ("Because the relief sought ... is unavailable as a matter of law, the case must be dismissed."). And, under Title VII, only *intentional* discrimination fits that bill. When Congress in 1991 expanded the remedies in Title VII cases to include compensatory and punitive damages, it did so only for "cases of 'intentional discrimination.'" *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (quoting 42 U.S.C. § 1981a(a)(1)). As Congress noted: "Virtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally"; employers who "have not accepted" that principle "should now be subjected to a damage remedy." H.R. Rep. No. 101-644, pt. 1 at 9 (1990). But other claims under Title VII remain limited to the statute's default equitable remedies, like backpay and reinstatement. 42 U.S.C. § 2000e-5(g)(1).

B. Denying an Exemption from a Neutral Rule Is Not Intentional Discrimination.

The EEOC claims that Abercrombie refused to hire Elauf because her headscarf did not comply with its Look Policy, a facially neutral dress code. It has made no claim that the Look Policy was, in its design or enforcement, a pretext for discrimination against Muslims. Rather, the EEOC's sole allegation is that Abercrombie "failed to accommodate [Elauf's] religious beliefs by making an exception to the Look Policy." Compl., D.Ct. Dkt. 2, ¶6. That is not a claim of intentional discrimination, since *any* headwear—religious or not—would have been treated the same.

1. Intentional discrimination, also known as disparate treatment, *Reeves*, 530 U.S. at 153, occurs when an employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters*, 431 U.S. at 335 n.15. The *sine qua non* of such a claim is "[p]roof of discriminatory motive." *Id.* A disparate-treatment plaintiff therefore must establish that he was treated worse than a similarly situated person not possessing the protected trait. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

Such disfavored treatment because of religion may stem from animus, *e.g.*, *Shapolia*, 992 F.2d at 1037 ("animus directed against non-Mormons"), or preference for one's own religion, *e.g.*, *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) (employee allegedly fired for not "follow[ing] [her] employer's religious beliefs"). Or there may be more benign reasons for intentional religious classification. *E.g.*, *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 531 (5th Cir. 1986) (medical program excluded Jews from rotation in Saudi Arabia due to concern about visas). Whatever its basis, intentionally treating people differently on account of their religion is prohibited disparate treatment.

Because "religion" in Title VII includes religious "practice," 42 U.S.C. § 2000e(j), disparate treatment based on religion also occurs if an employer treats religious practices (or certain religious practices) less favorably than secular (or other denominational) analogues. *E.g.*, *Endres*, 334 F.3d at 626 (ban on headwear allegedly applied only to religious hats); *Dixon v. Hallmark Cos.*, 627 F.3d 849, 853 (11th Cir. 2010) (prohibition only of "religious" office displays).

The common denominator in these cases is that the employer takes action *because of* the employee's protected trait; the action would not be taken against similarly situated employees differing only in their faith. Indeed, that is how this Court defines intentional discrimination: action taken "'because of,' not merely 'in spite of,' its adverse effects" on a class. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

By contrast, an employer who applies a neutral policy on equal terms is not treating "some people less favorably than others because of their ... religion." *Teamsters*, 431 U.S. at 335 n.15; *see also Alexander v. Choate*, 469 U.S. 287, 292-94, 301 (1985) (distinguishing failure to make "reasonable accommodations" from "purposeful discrimination"). To the contrary, not drawing exceptions for religion is treating all people *the same*, without regard to religion. Failure to treat religious adherents *more favorably*, by exempting them from rules applied to others, cannot be characterized as treating them "*less favorably* than others because of their ... religion." *Teamsters*, 431 U.S. at 335 n.15 (emphasis added).

Put another way, an employer who acts based on violation of a neutral rule, regardless of the motive for the violation, is *indifferent* to religion. It is not engaged in *intentional* religious discrimination. While an indifferent employer applying a neutral policy may violate Title VII, *see infra*, Part I.C, it cannot do so on an intentional-discrimination theory.

2. The notion that failure to make exceptions to a neutral policy is not intentional discrimination is hardly controversial. To the contrary, it has always been understood—by this Court, the lower courts,

Congress, and even the EEOC itself—that such claims, in effect for failure to accommodate religious practices, involve no discriminatory intent.

a. This Court's first discussion of Title VII's religion provisions squarely refutes the EEOC's current position. In *Trans World Airlines, Inc. v. Hardison*, a neutral seniority system for assigning shifts interfered with Hardison's Sabbath observance, and he so advised his employer. 432 U.S. 63, 67-68 (1977). The employer nonetheless declined to make an exception; Hardison refused to show up and was terminated. *Id.* at 68-69. The employer thus fired Hardison "because of" his Sabbath observance in the same way as Abercrombie, on the EEOC's account, refused to hire Elauf "because of" her headscarf.

On those facts, however, this Court held there was "no suggestion of discriminatory intent." *Id.* at 82. It accordingly invoked a Title VII provision that shields application of a "bona fide seniority or merit system" from challenge *unless* its adverse effects are "the result of an *intention* to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (emphasis added). Under that rule, "a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences," so long as there is no "discriminatory purpose." *Hardison*, 432 U.S. at 82. And because no such purpose existed, holding the seniority system unlawful would have been "plainly inconsistent with the dictates of § [2000e-2(h)]." *Id.*

Hardison thus forecloses the EEOC's theory that refusal to accommodate a religious practice—even if the employer correctly understands the religious basis for the practice—is intentional discrimination.

If the EEOC's view were correct, this Court could not have invoked § 2000e-2(h) to shield the assignments produced by TWA's seniority system, as they would necessarily have been "the result of an intention to discriminate because of ... religion."

This Court similarly distinguished intentional discrimination from mere refusal to allow exemptions from neutral rules in explicating the scope of the Free Exercise Clause. Under that Clause, religion-neutral state action is not problematic just because it incidentally burdens religion, *Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990); rather, only state action that "targets religious conduct for distinctive treatment" warrants strict scrutiny, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). That is, intentional religious discrimination is forbidden, but generally applicable rules that happen to burden religion are not. Yet on the EEOC's theory here, any knowing failure to make an exception to a neutral rule is *itself* intentional discrimination, thus wholly conflating what *Smith* held permissible with what it held unconstitutional.

Moreover, as the *Smith* Court explained, the line between intentional discrimination and mere failure to adjust neutral policies is consistent with other constitutional provisions. Just as "race-neutral laws" that have "the *effect*" of "disadvantaging a particular racial group" need not pass strict scrutiny, "religion-neutral laws that have the effect of burdening a particular religious practice" need not, either. *Smith*, 494 U.S. at 886 n.3 (citing *Washington v. Davis*, 426 U.S. 229 (1976)). The Court thus expressly equated the refusal to allow religious exemptions from neutral rules, as in *Smith* and this case, with the disparate-

impact theory rejected in *Washington v. Davis* as the standard governing racial discrimination under the Fourteenth Amendment; and the Court distinguished that type of "discrimination" from the *intentional*-discrimination standard adopted there. This reflects a clear understanding, again, that race-neutral or religion-neutral rules with discriminatory *effects* are plainly not *intentional* discrimination.

b. The lower courts, too, have always appreciated that failure to accommodate religion is not intentional discrimination. *E.g.*, *Reed v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 564 F.3d 781, 784 (6th Cir. 2009) ("There are two basic types of religious discrimination claims that an individual may bring," *i.e.*, "disparate treatment claims and religious accommodation claims."); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1034 (8th Cir. 2008) ("The district court properly instructed the jury that intentional religious discrimination and the failure to reasonably accommodate an employee's religion are distinct Title VII claims."); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) ("A plaintiff who fails to raise a reasonable inference of disparate treatment on account of religion may nonetheless show that his employer violated its affirmative duty under Title VII to reasonably accommodate employees' religious beliefs."); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) ("Besides forbidding intentional discrimination, Title VII requires an employer to try to accommodate the religious needs of its employees ...."); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 281 (3d Cir. 2001) ("[E]mployees may assert two theories of religious discrimination: 'disparate treatment[]' ...

and 'failure to accommodate.'") (footnote omitted); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1018 (4th Cir. 1996) (beyond "disparate treatment," plaintiff "can also bring suit based on the theory that the employer ... fail[ed] to *accommodate* her religious conduct").

Indeed, the lower courts have adopted different proof frameworks in light of the differences between the two theories. *See Shapolia*, 992 F.2d at 1037 (elements of failure-to-accommodate claim do not apply in "straightforward disparate treatment" case); *Venters*, 123 F.3d at 972 ("accommodation framework ... has no application" to disparate-treatment claim, which is "no different in kind from that presented in the familiar cases of race, sex, and age discrimination"). In disparate-treatment cases, courts use the *McDonnell-Douglas* framework to identify the employer's subjective motive for the adverse action. *E.g.*, *Abramson*, 260 F.3d at 281-82. By contrast, motive is irrelevant in accommodation cases. Courts hold that employees in those cases must instead show that the employer had notice of a religious conflict yet did not offer accommodation; the burden then shifts to the employer to prove that accommodation would have caused undue hardship. *Thomas*, 225 F.3d at 1155 n.6 (noting that "purpose of the burden-shifting mechanism differs in ... a religious discrimination failure to accommodate case" because it is not used "to probe the subjective intent of the employer"); *see also Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1284 (7th Cir. 1996) ("Because this is not a disparate treatment case, the *McDonnell-Douglas* burden-shifting method of proof is unnecessary and inappropriate here.").

In short, the Circuits have always distinguished between intentional discrimination and claims based on failure to make exceptions to neutral rules. No court has ever suggested that the former somehow encompasses the latter.

c. Further, it is clear that Congress was keenly aware of the difference between intentional discrimination and the failure to accommodate those with special needs.

In the new remedial provisions enacted as part of the Civil Rights Act of 1991, Congress expressly separated the two theories in the disability context. It authorized monetary relief *both* against defendants "who engaged in unlawful intentional discrimination" under the Rehabilitation Act or its regulations, *and* against those who "violated the requirements of [that law and regulations] ... concerning the provision of a reasonable accommodation." 42 U.S.C. § 1981a(a)(2). Congress must have understood the two theories to be distinct, or else the latter clause was superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Nor was this simply a question of labels. Rather, Congress attached substantive legal effect to the distinction, providing a "good faith" defense to this new monetary liability only "where a discriminatory practice involves the provision of a reasonable accommodation" under the disability discrimination laws. 42 U.S.C. § 1981a(a)(3). No such defense exists in cases of intentional disability discrimination.

On the EEOC's theory, by contrast, intentional discrimination *encompasses* failure to accommodate. That renders Congress's choice of language nonsensical. It would also fundamentally distort the remedial scheme, allowing money damages in Title

VII accommodation cases even though Congress allowed them only for (i) *intentional* discrimination under Title VII, and (ii) failure to accommodate *disabilities*. *See id.* § 1981a(a)(1) (damages for Title VII intentional discrimination); *id.* § 1981a(a)(2) (damages for intentional disability discrimination and also failure to accommodate disabilities). But "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983)). "Had Congress intended to" authorize money damages for Title VII accommodation claims, "it presumably would have done so expressly as it did in the immediately following subsection," regarding disability claims. *Id.*

Even worse, the EEOC's theory would authorize money damages in Title VII accommodation cases *without* a good-faith defense, even though Congress was careful to include one for claims based on failure to accommodate disabilities. 42 U.S.C. § 1981a(a)(3). Congress would not have immunized employers who make "good faith efforts" to accommodate disabilities, but left exposed those who make a good-faith effort to accommodate religious practices. Rather, Congress included no good-faith *defense* for claims on a failure-to-accommodate theory because it established no monetary *liability* in the first place.

In short, the EEOC's argument is at war with basic antidiscrimination law and makes a mess of a statute that Congress crafted based on the well-recognized distinction between failure to accommodate and intentional discrimination.

d. Finally, the EEOC itself, both in its longstanding guidance and in its litigation below, has recognized that enforcing a neutral rule that conflicts with a religious practice is *not* disparate treatment. Its brief in this Court appears to be the agency's first contrary suggestion.

"A religious accommodation claim is *distinct* from a disparate treatment claim, in which the question is whether employees are treated equally." *Compliance Manual*, § 12-IV (emphasis added). "An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion," *id.*—a form of *special*, rather than *equal*, treatment.

Indeed, to exemplify an "accommodation" claim, as opposed to a disparate-treatment claim, the EEOC imagines an employee who "ask[s] for an exception" to a "dress or grooming policy that conflicts with [her] religious beliefs or practices." *Id.* § 12-IV.C.4.a. It thus effectively describes Abercrombie's Look Policy as presenting a failure-to-accommodate claim, in contradistinction to an intentional-discrimination claim. *See also* 29 C.F.R. § 1605.2(a) (distinguishing "obligation ... to accommodate the religious practices of employees" from "other obligations under title VII not to discriminate on grounds of religion").

Consistent with that distinction, the EEOC below pressed only a failure-to-accommodate theory, *not* a disparate-treatment theory. The phrases "disparate treatment" and "intentional discrimination" do not appear in the EEOC's summary judgment briefs, Tenth Circuit briefs, or certiorari petition. And the only mention of "intentional discrimination" in the EEOC's certiorari reply expressly *distinguished* this

case from another case that "address[ed] intentional discrimination, not religious accommodation." (Govt. Cert. Reply 7 n.*.) The EEOC's complaint likewise alleged only that Abercrombie "failed to accommodate [Elauf's] religious beliefs by making an exception to the Look Policy." D.Ct. Dkt. 2, ¶6. And in seeking summary judgment and defending it on appeal, the EEOC invoked the Tenth Circuit's *Thomas* decision, 225 F.3d 1149. (Govt.C.A.Br.25; SJ Br., Dkt. 68, at 16-17.) Yet *Thomas* was an accommodation case; it held that the plaintiff had not "raised an intentional religious discrimination claim distinct from his claim that [defendant] failed reasonably to accommodate his religious beliefs," and so could not press that "distinct" claim. 225 F.3d at 1157 n.9. Moreover, the court said, any such claim would fail, because the plaintiff "offered no evidence that [defendant] acted out of a discriminatory motive against his religion," or that its neutral explanation was "pretextual." *Id.*

In short, the EEOC has never before suggested that failure to accommodate religious practice equals disparate treatment, and it previously litigated this case on the contrary premise. It shifted theories only in this Court, evidently after realizing that only an intentional-discrimination theory could salvage its purely monetary award. *See supra*, Part I.A.

3. In the face of all of this, the EEOC makes two counterarguments. Both misconstrue the nature of intentional discrimination.

First, the EEOC suggests that when an employer "correctly understands" that an employee's basis for non-compliance with a neutral work rule is religious, the employer intentionally discriminates by enforcing the neutral policy against the employee. It cites the

tort principle that one intends whatever he knows to be "substantially certain to result" from an action. (Govt.Br.24.) But, as this Court explained in *Feeney*, that is not the test for intentional discrimination: A "volitional" act with "foreseeable" adverse effects on a protected class is not intentionally discriminatory. 442 U.S. at 278. "'Discriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences." *Id.* at 279. Even actual knowledge of an employee's religious basis for violating a neutral work rule thus does not suggest that the employer enforced the rule "'because of,' not merely 'in spite of,'" that religious basis. *Id.* Mere *knowledge* of a protected trait is obviously not the same as *intent to discriminate because of* that trait.

Second, the EEOC argues by syllogism from Title VII's text: The statute proscribes the refusal to hire "because of" religion; "religion" includes "religious practice"; and since Elauf's headscarf happened to be a "religious practice," refusing to hire her based on it is intentional religious discrimination. (Govt.Br.23.)

That syllogism fails because the fact that Elauf's headscarf was religious was *irrelevant* to the decision not to hire her. "Because of," as this Court recently reiterated, means "by reason of" or "on account of," implying the causal link associated with a "disparate-treatment claim." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). But here, religion was not a "but-for" cause, *id.*, of the adverse action: The same result would have followed even if Elauf's conduct had *not* been religious. Nor was it even a "motivating factor." 42 U.S.C. § 2000e-2(m). After all, the Look Policy applies *equally* to secular headwear. At most, then, Abercrombie discriminates "because of" *all*

headwear. But that is not discrimination "because of" religion or religious practice. To hold otherwise collapses the basic distinction between disparate treatment and failure to accommodate.[2]

Accordingly, just as a neutral seniority system is not intentional discrimination "because of" Sabbath observance, *Hardison*, 432 U.S. at 82, and a neutral ban on drug use is not intentional discrimination "because of" the religious practice of ingesting peyote, *Smith*, 494 U.S. at 886 n.3, a neutral headwear ban is not intentional discrimination "because of" the religious practice of wearing a headscarf. In each case, similarly situated religious and secular practices are treated exactly the same.

Linguistically, the flaw in the EEOC's syllogism is that it misunderstands the role of the adjective "religious" in the phrase "religious practice." By way of illustration, to say that someone was fired "because of" his "messy beard" plainly means that it was the *messiness* of his beard that was determinative—not that *any* beard would have been a firing offense. Likewise, to say that an employer discriminated against someone "because of" his "religious practice" necessarily means that the discrimination was based

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[2] Contrary to the EEOC's passing suggestion (Govt.Br.23), Title VII's "motivating factor" or "mixed-motive" framework thus does not apply here. Abercrombie's argument is not that "other factors" beyond the headscarf "also motivated" its action. 42 U.S.C. § 2000e-2(m). It admittedly acted based on the headscarf—but not its *religious* character, and the action was thus not disparate treatment based on religion. Abercrombie "would have taken the same action" even if Elauf had worn her headscarf for other reasons, and so even on a mixed-motive theory, a court could "not award damages." *Id.* § 2000e-5(g)(2).

on the *religious nature* of the practice, not that the practice was objectionable regardless of its basis. In other words, discrimination "because of religious practice" implies that a similar secular practice would not have triggered the same result. The contrary reading—that an act is "because of religious practice" even if it would have been taken *regardless* of religion—ignores that Title VII proscribes only action taken "because of ... *religion*." 42 U.S.C. § 2000e-2(a) (emphasis added). Religion, to be sure, "includes" religious practices, *id.* § 2000e(j), but the statute remains directed at *religious discrimination*. Downplaying the word "religious" in "religious practice," as the EEOC does, is fundamentally out-of-step with that basic mandate.

Tellingly, even the EEOC does not truly embrace its own syllogism, because it admits that an employer that has *no idea* that a practice is religious does not intentionally discriminate by enforcing a neutral rule against the practice. (Govt.Br.23.) It would be absurd to claim otherwise. *See Raytheon*, 540 U.S. at 54 n.7 (if defendant was "truly unaware" of disability, plaintiff "cannot, *ipso facto*, have been subject to disparate treatment"). But, in such a case, the action is no less "because of" a "religious practice" than here; the causal link between a practice that happens to be religious and the adverse action is identical. To distinguish this case, the EEOC thus adds a new element: To be liable, an employer must "correctly understand" the religious conflict. (Govt.Br.22.) But that invented limit is wholly atextual and simply repeats the fallacious argument rejected in *Feeney*—that being *aware of* effects on a protected class is equivalent to intentionally discriminating "because of" a protected trait. That is not the law.

C. Title VII Also Forbids Certain Actions with Discriminatory *Effects*, But That Is Distinct from *Intentional* Discrimination.

To be sure, intentional discrimination is not the only conduct proscribed by Title VII. The statute also forbids some neutral rules with discriminatory *effects*. In the religion context, that concept has given rise to claims alleging "failure to accommodate" religion. But, as noted, courts and the EEOC have distinguished that theory of relief from intentional discrimination. And, because the EEOC no longer presses an accommodation theory (which could not trigger money damages), it is not presented here.

1. In *Griggs*, this Court construed Title VII to reach beyond intentional discrimination. The employer there required employees to have a high-school diploma and pass a standardized test. *See* 401 U.S. at 425-26. Although those policies were adopted "without any 'intention to discriminate,'" *id.* at 432, that was not dispositive. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures ... that operate as 'built-in headwinds' for minority groups," because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* Policies "neutral on their face, and even neutral in terms of intent," still violate Title VII, the Court held, if they burden a protected trait and are not justified by "business necessity." *Id.* at 430-31. That theory is now known as adverse (or disparate) impact.

2. In the context of religion, this discriminatory-effects theory means that even if a work rule is "neutral on [its] face, and even neutral in terms of intent," it may still violate Title VII, if it has

"*consequences*" that "operate as 'built-in headwinds'" for religious minorities. *Id.* at 430-32. To avoid such effects, the employer may be required to affirmatively offer religious accommodation. Although no duty to accommodate is separately expressed in the statutory text, which only prohibits *discrimination* and creates a *defense* if an accommodation would impose undue hardship, *see* 42 U.S.C. §§ 2000e-2(a), 2000e(j), courts have derived a failure-to-accommodate theory based on *Griggs*' adverse-impact theory of discrimination.

a. Analytically, a claim that a neutral rule imposes adverse effects on a religious practice is akin to a claim that a neutral rule has an adverse effect on a particular race or sex. For example, courts have held that grooming rules forbidding beards have an adverse impact on blacks, because many black men suffer from a skin condition that makes shaving impossible. *E.g.*, *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 796-99 (8th Cir. 1993). Courts have thus required those employers to grant exceptions—*i.e.*, accommodations—to the neutral policy. *E.g.*, *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 59 (D. Colo. 1981). Of course, beards are also often worn for religious reasons, and the EEOC has filed materially identical lawsuits demanding *religious* exemptions to no-beard rules. *E.g.*, *EEOC v. United Parcel Serv.*, 94 F.3d 314, 315 (7th Cir. 1996). Religious-accommodation suits are thus complaints about discriminatory effects of neutral rules. *Id.* at 317 n.3 ("Religious practice cases ordinarily stem, as do 'disparate impact' cases, from the application of some neutral employment policy which has the effect ... of excluding certain employees ... "). Failure to accommodate religion is just adherence to a policy with discriminatory *effects* on religious practice. *See generally* Christine Jolls,

Antidiscrimination and Accommodation, 115 HARV. L. REV. 642, 651-53 (2001).

b. Historically, too, the accommodation theory of religious discrimination was justified by the EEOC and adopted by Congress and the courts as an application of the *Griggs* approach to Title VII.

When Title VII was enacted in 1964, it did not include the special definition of religion that sweeps in religious "observance and practice" and exempts practices that cannot be accommodated absent undue hardship. It merely forbade discrimination "because of ... race, color, religion, sex, or national origin." *See* Civil Rights Act of 1964, § 703(a), Pub. L. No. 88-352, 78 Stat. 255. The question soon arose whether that prohibition covered only intentional discrimination or also rules that are discriminatory "in effect."

The EEOC aggressively urged the broad view. It promulgated regulations providing that, to avoid "discriminatory effects," employment tests that "adversely affect[] ... classes protected by title VII constitute[] discrimination" unless validated as predictive of job performance. 35 Fed. Reg. 12333, 12334 (Aug. 1, 1970). As to religious discrimination, the EEOC likewise took the position that "the duty not to discriminate on religious grounds ... includes an obligation ... to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship." 32 Fed. Reg. 10298, 10298 (July 13, 1967). The EEOC thus urged a consistent effects-based approach throughout the statute.

Courts were, at least initially, more guarded. In *Griggs*, for example, the Fourth Circuit held that the employer's requirements were permissible because

they were adopted without discriminatory intent. *See* 420 F.2d 1225, 1232-35 (4th Cir. 1970) (because policies applied to all races, "it could not be said that [plaintiffs] have been discriminated against").

Courts addressing employee challenges to neutral policies that impeded religion similarly divided over whether the law required accommodations. *Compare, e.g., Jackson v. Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276, 1278 (E.D. La. 1969) (employee fired for refusing work on Sabbath was "discharged because of her religion"), *with Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 330 (6th Cir. 1970) (termination for Sabbath observance "was not discrimination on account of ... religion" but rather for violation of "provisions of the collective bargaining agreement" that "were applicable equally to all employees").

This Court then decided *Griggs* in March 1971, reversing the Fourth Circuit and recognizing the adverse-impact theory of racial discrimination under Title VII. A month later, the Court heard argument in *Dewey*, to consider whether the Sixth Circuit had similarly erred by limiting religious discrimination to intentional discrimination. 402 U.S. 689 (1971).

Notably, the Government filed an *amicus* brief in *Dewey*, arguing that *Griggs* compelled reversal. Employment policies that are "neutral on their face" yet "have a religiously discriminatory effect" are unlawful under "this Court's recent decision in *Griggs*," the EEOC said, unless they are compelled by business necessity—a concept "reflected in" the EEOC's regulation "requir[ing] employers to make 'reasonable accommodations to the religious needs' of their employees." Br. for United States as Amicus Curiae at *7, *13, *Dewey*, 402 U.S. 689, 1971 WL

133107. The Government thus defended the EEOC's rule as simply the religious manifestation of *Griggs*.

Dewey was affirmed by an equally divided Court, 402 U.S. 689, likely because of "[o]ther factors" that made the case a poor vehicle. *Hardison*, 432 U.S. at 73 n.8 (noting that *Dewey* also presented questions whether EEOC rule was entitled to retroactive effect, whether earlier arbitrator's ruling was conclusive, and whether employer satisfied accommodation duty in any event). As a result of that affirmance without opinion, the law "remained unsettled" on whether or how *Griggs* applied to religion claims. *Id.* at 73.

Shortly thereafter, in 1972, Congress sought to "resolve by legislation" that issue. 118 Cong. Rec. 706 (Jan. 21, 1972) (Sen. Randolph). It clarified that "religion" includes religious "practice," but provided employers a defense where accommodation would cause "undue hardship"—the EEOC's standard from its regulation. Equal Employment Opportunity Act of 1972, § 2(7), Pub. L. No. 92-261, 86 Stat. 103. Legislative history made clear that Congress directly "disapproved" *Dewey*'s holding that accommodation is not required. *Hardison*, 432 U.S. at 74 n.9.

After *Griggs* and the 1972 amendment, the lower courts recognized that their earlier cases rejecting challenges to religion-neutral policies were no longer good law. The Sixth Circuit, for example, reasoned that "[w]hatever doubts there may have been about ... this [EEOC] regulation or its consistency with the statute have been, we believe, laid to rest by a unanimous Supreme Court in *Griggs*." *Reid v. Memphis Publ'g Co.*, 468 F.2d 346, 350 (6th Cir. 1972). An "additional reason" for so holding was that the 1972 amendment "incorporate[d] the substance of"

the EEOC rule. *Id.* at 350-51. The question was thus not whether the employer's "rules were intentionally discriminatory as to religion, but rather whether [it] could make 'reasonable accommodation.'" *Id.* at 351.

Similarly, in requiring accommodation of employees' Sabbath observance, the Fifth Circuit began with the statute as construed by *Griggs*, used the EEOC regulation to corroborate that reading of the statute, and then cited the 1972 amendment as "lay[ing] to rest" any "doubt" over whether that rule had "truly expressed the will of Congress." *Riley v. Bendix Corp.*, 464 F.2d 1113, 1115-16 (5th Cir. 1972). Again, the EEOC agreed. Br. for United States as Amicus Curiae at *35, *Hardison*, 432 U.S. 63, 1977 WL 189773 (explaining that if "as *Griggs* ... teaches," Congress may address "discriminatory consequences of employment practices" and not merely "intentional discrimination," accommodation may be required).[3]

In sum, the accommodation theory of religious discrimination was developed by the EEOC in a parallel regulation to its rules forbidding adverse-impact race discrimination; defended as an application of *Griggs* in the religious context; and adopted by Congress to codify that rule.

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[3] State courts, too, cite *Griggs* to explain why laws forbidding religious discrimination include an implicit duty to accommodate. *E.g.*, *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193, 201-02 (Wash. 2014); *Rankins v. Comm'n on Prof'l Competence*, 593 P.2d 852, 855-56 (Cal. 1979); *Wondzell v. Alaska Wood Prods., Inc.*, 583 P.2d 860, 864 n.4 (Alaska 1978); *Me. Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union AFL-CIO*, 383 A.2d 369, 375-78 (Me. 1978).

3. This statutory history further corroborates that failure to accommodate religion is not a form of intentional discrimination, as the EEOC argues here, but rather grows out of a distinct theory that focuses on the adverse *effects* of facially neutral rules.

Beyond that, the history also confirms the failure of the EEOC's textual syllogism. Again, the EEOC argues that an employer who refuses to hire an applicant "because of" a headscarf that happens to be a "religious practice" necessarily commits intentional discrimination in violation of Title VII. (Govt.Br.23.) As explained above, if the failure to hire is based on a religion-neutral rule, it is not "because of" religion or religious practice on the ordinary meaning of that phrase. *See supra*, Part I.B.3.

For that reason, many have argued that *Griggs*' imposition of liability for neutral policies must stem from other aspects of the statute. *See Smith v. City of Jackson*, 544 U.S. 228, 235-36 (2005) (plurality op.); *id.* at 250 (O'Connor, J., concurring in judgment) (debating basis for *Griggs*). But others, including the Government, have argued that *Griggs* adopted a broader gloss on the words "because of." *E.g.*, Br. for the United States as Amicus Curiae at 19-21, 31-32, *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, No. 13-1371 (U.S. Dec. 2014). On that understanding, *Griggs* construed Title VII to mean that an employer discriminates "because of" protected traits by enforcing rules with unintentional adverse effects on individuals with those traits. Firing someone "because of race" could mean, on that view, either true race-conscious disparate treatment or the type of race-neutral policy in *Griggs*.

But, even if so, the EEOC's syllogism answers the wrong question. To obtain reversal, the EEOC must establish that Abercrombie committed *intentional discrimination*. So if Title VII forbids discriminating "because of" a protected trait in two distinct ways—by treating employees with the trait worse than similarly situated comparators, or by taking action that unintentionally has an adverse effect on those with the trait—then the EEOC must show that Abercrombie acted "because of" religion in the *former* sense. That, as explained, it cannot do. Abercrombie declined to single out religion for *special favor*, but that at worst could be "because of" religion only in the looser, *Griggs* sense. It clearly did not single out religion for *special disfavor*—the only meaning of "because of" that reflects intentional discrimination.

II. IF THIS COURT REACHES THE ISSUE, IT SHOULD HOLD THAT EMPLOYERS CANNOT BE LIABLE ABSENT ACTUAL KNOWLEDGE OF A RELIGIOUS CONFLICT.

An effects-based claim premised on Abercrombie's failure to accommodate may well be the more apt way to analyze this case. But as explained, the EEOC presses only an intentional-discrimination claim, because it is the only one that could support the relief at stake. This case therefore offers no opportunity to explore effects-based claims, the parameters of such claims, or the applicable *mens rea*. It surely presents no opportunity to resolve the disagreement between the Tenth Circuit and the EEOC, because neither "actual knowledge" of a religious conflict (the Tenth Circuit's view) nor a "correct understanding" (the EEOC's view) could support the intentional-discrimination claim here. Only *intent* could do so,

and intent is clearly absent. That should be the end of the case (either through affirmance or dismissal).

If this Court nonetheless reaches the question whether an employer can be liable for failure to accommodate even absent actual knowledge of the religious conflict, the judgment below should still be affirmed. The EEOC's position—that employers are liable if they "correctly understood" (or "suspect[ed]") a conflict—has no basis in the statute or caselaw. It is utterly impractical. It would encourage if not require employers to stereotype and intrusively probe applicants' religious beliefs. And there is no need for it: The employee will usually be best suited to broach the issue—which is why requiring the employee to do so has been a satisfactory rule for decades.

A. Employees and Applicants Should Bear the Burden To Raise Any Religious Conflicts.

Practically, the difference between the Tenth Circuit's position and the EEOC's amounts to this: Who bears the burden of first broaching a potential religious conflict? The Tenth Circuit puts that burden on the employee. The EEOC would, in effect, shift it to the employer. The former rule, unlike the latter, is supported by both precedent and policy.

1. Until this case, the EEOC itself took the position that employees bear the burden of advising of religious conflicts. The regulation that addresses religious accommodation, after first repeating the key statutory language, 29 C.F.R. § 1605.2(b)(1), states that "*[a]fter* an employee or prospective employee notifies the employer ... of his or her need for a religious accommodation, the employer ... has an obligation to reasonably accommodate," *id.* § 1605.2(c)(1) (emphasis added).

The EEOC weakly insists that the regulation does not expressly *reject* an accommodation duty *absent* notification (Govt.Br.24), but recognizing a duty *after* being given notice "creates a clear negative implication" that no duty exists otherwise. *Custis v. United States*, 511 U.S. 485, 491 (1994). The EEOC so admitted when it promulgated the rule, explaining that the "obligation to accommodate *begins* when an individual notifies the employer of the need for an accommodation." 45 Fed. Reg. 72610, 72610 (Oct. 31, 1980) (emphasis added). *Accord Compliance Manual*, § 12-IV.A.1 (applicants "must make the employer aware" of "need for accommodation" and that its basis is "a conflict between religion and work").

At a minimum, these earlier statements belie the agency's current contention that putting the burden on the employee would trigger all sorts of bad policy consequences. (Govt.Br.24-28.) For forty years, even the EEOC thought that it worked just fine.[4]

By contrast, the EEOC asks the Court to ignore what it said in the past and defer to what it says now. (Govt.Br.31-33.) Indeed, the EEOC issued—after the Tenth Circuit decision below—a new publication that

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[4] Apart from its briefs below, the only source the EEOC cites to show that it "here and elsewhere" eschewed an actual-knowledge test (Govt.Br.31) is a district-court brief in which it said that "an employee need not explicitly ask for a religious accommodation" *after* apprising the employer of the religious conflict. EEOC Br. at 14, *EEOC v. GKN Driveline N. Am., Inc.*, 1:09CV654, 2010 WL 5093776 (M.D.N.C. Dec. 8, 2010). The employer in that case indisputably had actual knowledge of the conflict, because the employee expressly told it that, "because of my religion, I would rather take the urinalysis than the swab test." *GKN*, 2010 WL 5093776, at *6.

adopts its litigation position in this case. *Supra* n.1. But no deference is owed to that litigation-driven flip-flop. Under *Skidmore v. Swift & Co.*, which the EEOC admits is the standard (Govt.Br.31), deference turns on the "consistency [of the agency view] with earlier ... pronouncements." 323 U.S. 134, 140 (1944). The EEOC's new position is anything but consistent. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference "unwarranted" if construction "conflicts with a prior interpretation" or represents "convenient litigating position"); *see also* 42 U.S.C. § 2000e-12(b) (allowing defense to Title VII liability for reliance on "written interpretation ... of the Commission," even if later "modified").

2. The ADA offers an instructive analogy for why the burden should be on employees to request an accommodation. The ADA mandates "reasonable accommodations to the *known* physical or mental limitations" of a disabled person, absent undue hardship to the employer. 42 U.S.C. § 12112(b)(5)(A) (emphasis added). That is, "the employer must know of ... the disability" before it is obliged to do anything. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999). Thus, "before an employer's duty to provide reasonable accommodations—or even to participate in the 'interactive process'—is triggered[,] the employee must make an adequate request." *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011); *see also Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346-47 (4th Cir. 2013). After all, a disability may not be "open, obvious, and apparent to the employer," but instead "uniquely within the knowledge of the employee." *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996).

The EEOC also generally discourages unsolicited efforts by employers to discover employee disabilities. The statute itself prohibits pre-selection inquiries into applicant disabilities, 42 U.S.C. § 12112(d)(2)(A), and an employer cannot ask if an applicant "needs a reasonable accommodation" unless it "*knows* that an applicant has a disability," EEOC, *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, http://www.eeoc.gov/policy/docs/accommodation.html (Oct. 2002) (emphasis added). Actual knowledge, rather than employer-prying, is thus the rule for the ADA.[5]

3. The employee should also bear the burden of first raising the issue of religious accommodation.

In deciding how to allocate the burden of raising a religious conflict, it is appropriate to consider which party is typically best suited to bear it. *See Delo v. Lashley*, 507 U.S. 272, 277-78 (1993) (considering whether states or defendants are "better positioned" to adduce criminal-history evidence); *Martin v. Wilks*,

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[5] Contrary to its current claim (Govt.Br.32), the EEOC has not previously defied the ADA's plain text by rejecting an actual-knowledge standard. *See* EEOC Reply Br. at 16, *EEOC v. Agro Distrib. LLC*, 555 F.3d 462 (5th Cir. 2009) (admitting that the duty turns on "whether the *employee* ... provides the employer with enough information that ... the employer can be fairly said *to know* of both the disability and the desire for an accommodation" (emphasis added)); EEOC Br., *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91 (1st Cir. 2007) (acknowledging that duty generally "must be triggered by a request" and that employer must attempt to provide an accommodation if it "*knows* of a disability" (emphasis added)).

490 U.S. 755, 767 (1989) (parties "best able to bear the burden" of joining affected non-parties).

Here, it is clear that applicants or employees are, as a general matter, better suited than employers to first raise the prospect of a religious conflict. As the EEOC explains, to recognize a religious conflict one must understand (i) the employee's religious practice and (ii) the conflicting workplace rule. (Govt.Br.29.) The employee will always know the former, and the employer will always know the latter. The employer, however, will *never* independently know that the employee's conflicting practice is religious. Rather, given the multitude of religious beliefs (Pet.App.18a) and their "uniquely personal and individual" nature (Pet.App.48a), the "key questions that determine whether an employer has an obligation under Title VII to provide a reasonable religious accommodation ordinarily are only within the ken of the applicant or employee" (Pet.App.46a). *See Great Lakes*, 330 F.3d at 935-36 ("A person's religion is not like his sex or race—something obvious at a glance," and "employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects."). At most, an employer could guess or infer that an employee's practice is motivated by religion.[6]

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[6] Given the personal nature of religious belief, an employer would typically obtain actual knowledge only from the employee personally. In rare cases, *e.g.*, if an employee tells a co-worker who in turn tells the employer, knowledge might come indirectly. *E.g.*, *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999) (knowledge from previous employer); *see Compliance Manual* § 12.IV.A.1 n.120 (citing *Hellinger*). (Govt.Br.33.) The Tenth Circuit allowed for that possibility, but here Abercrombie lacked actual knowledge from *any* source. *See* Pet.App.34a.

By contrast, the employee will ordinarily be aware of, or come to understand, the applicable work rules. After all, such rules are necessarily disclosed to those expected to abide by them. In the *typical* case, then, the employee will be positioned to inquire about the potential conflict; the employer will not.

The EEOC objects that this will not *always* be true: Some applicants might not know the work rules and thus not recognize the conflict or think to request accommodation. (Govt.Br.27-30.) But even if the EEOC's rule "solves" its hypothetical, the cure is worse than the disease. Even on the EEOC's view, shifting the burden to employers who lack actual knowledge is advantageous only if (i) the applicant's observable practice is so obviously religious that the employer "correctly understands" its basis; but (ii) the work rules are unknown to the applicant and the employer does not mention them; and (iii) the employer provides no reasons for its adverse action. This is a rare coincidence of events, as illustrated by the EEOC's failure to identify *any case* presenting them. *Cf. infra*, Part II.B.1 (distinguishing cases).[7]

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[7] Indeed, even this highly unusual case does not present those facts. Elauf, after all, knew enough about Abercrombie to ask her friend who worked there whether her headscarf would be problematic. An assistant manager who had nothing to do with the hiring process told Elauf's friend that a headscarf should be okay, but Elauf herself evidently placed little stock in his relayed advice: that manager also said a *black* headscarf would be prohibited, yet she wore one to the interview. *Supra* at p.10; Pet.App.44a n.11. Cooke also described the Look Policy at the interview and prompted Elauf to ask any questions. *Supra* at p.11. It is thus hard to conclude that Abercrombie is more at fault than Elauf for not pursuing further inquiries.

On the other hand, the EEOC's rule shifts the burden *whenever* the employer assumes or even just "suspect[s]" a "potential" conflict (Govt.Br.21)—an indeterminate, potentially enormous set of cases—even if the employee is fully aware of the conflict and chooses to say nothing. Not only is there no basis to shift the burden in that far more common situation—why should the employer with mere *suspicion* bear the burden over the employee with full *knowledge*?—but the EEOC's rule would also trigger adverse policy effects in all those cases. *Infra*, Part II.B. Moreover, by muddying the waters on who bears the burden, the EEOC's rule may sow additional confusion for employees, potentially inducing their silence and leading to *more* "missed" accommodations. (*Cf.* Govt.Br.26-27.)

Put another way, the EEOC is asking for a rule to address a hypothetical scenario, even though in the mine run of cases it would lead to worse outcomes.

At bottom, the EEOC's true complaint is that employees and applicants sometimes are not told the ground for adverse action against them. That surely makes it harder to vindicate their right to be free of discrimination (based on *any* protected trait). But that concern is simply a policy argument against employment-at-will doctrine, which allows employers to act without even having reasons, much less disclosing them. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008). Whatever the merits of that well-settled rule, this Court should not twist Title VII law so as to effectively overturn it.

B. The "Suspect a Possible Conflict" Standard Is Invented, Unadministrable, and Inequitable.

The EEOC's position is that an employer need not have "actual knowledge" that a certain practice is motivated by religion to be liable for taking adverse action against it. It suffices, the EEOC says, if the employer "correctly understands" that the practice is religious (Govt.Br.18-20), or "suspects" a "possible" conflict between religion and work rules (Govt.Br.21, 30). That standard, invented from whole cloth, would lead to a host of practical problems and ultimately be at war with Title VII's most basic purpose—combating stereotypes based on protected traits.

1. The EEOC's test has no basis in Title VII's text, *see supra*, Part I.A.3, or in caselaw. The EEOC's petition for certiorari cited three cases as allegedly conflicting with the Tenth Circuit, but none of them adopted the "correctly understands" test or "suspect a possible conflict" standard. Those employers *facially* discriminated against religion or had *actual knowledge* of the religious conflict.

In *Dixon*, a rental complex prohibited "religious items" in the management office out of fears that such displays would violate the Fair Housing Act. 627 F.3d at 853. And in *Brown v. Polk County*, the employer specifically forbade "*religious* proselytizing, witnessing, or counseling." 61 F.3d 650, 652 (8th Cir. 1995) (en banc) (emphasis added). Unlike the Look Policy, these policies facially singled out religious conduct for distinct treatment, and so the employers could hardly have complained they did not know the conduct was religious—that was precisely why they punished it.

As for *Heller v. EBB Auto Co.*, the plaintiff there told his employer that his wife was converting to Judaism and that he needed time off to attend the ceremony. *See* 8 F.3d 1433, 1437 (9th Cir. 1993). A religious conversion could hardly be anything other than religious, and so the Ninth Circuit rejected the employer's complaint that it lacked notice. *See id.* at 1439. That is a far cry from holding that an employer with no actual knowledge of a religious conflict could still be liable for failure to accommodate.

2. Because its rule cannot be justified under Title VII's text or prior judicial interpretation, the EEOC principally argues that it reflects good public policy. (Govt.Br.24-28.) Just the opposite.

a. To start, its test is woefully unclear. The EEOC's own brief wobbles between formulations that suggest very different levels of awareness. It sometimes says that an employer's "understand[ing]" is needed (Govt.Br.18-20), implying a high confidence level. But it also repeatedly mentions obligations for employers who "suspect a possible religious conflict" (Govt.Br.21, 30), a seemingly much lower degree of recognition. And either way, what do those abstract standards mean? Is an assumption enough to form an "understanding"? What about a hunch or a guess? An *educated* guess? Must the "understanding" be based on a confidence level, like preponderance of the evidence? The EEOC never deigns to explain its rule. *Cf. Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2449-50 (2013) (rejecting EEOC's definition of "supervisor" as "study in ambiguity" with "no clear meaning" that would "present daunting problems" for lower courts).

The EEOC is also strategically ambiguous over whether its test is purely *subjective* or would also

hold employers liable if they *should have* understood or suspected the possible conflict, but did not. Its brief now suggests the former, yet its earlier filings included an objective prong. At the certiorari stage, for instance, the EEOC suggested that an employer could be liable "even if [it] failed to grasp the need for an accommodation at all, so long as a reasonable person would have understood the conflict." Pet. 23. The EEOC will undoubtedly advocate that broader, objective view in the next case. Indeed, its *amici* have already made the jump, contending that employers deserve, at most, "inquiry notice"—once an employer learns "a potential conflict *may* exist," it must "inquire further." Religious & Civil Rights Orgs. Amici Br. 26; *see also* Ariz. Amici Br. 5 ("[O]nce the employer ... should know of [] a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict ...."); Am.-Arab Antidiscrim. Comm. Amici Br. 4 (arguing for "constructive knowledge" test).

Moreover, even if the test is purely subjective, often the best and only evidence of subjective belief is what a reasonable person would have believed under the circumstances. *Cf. Washington*, 426 U.S. at 253 (Stevens, J., concurring) ("Frequently the most probative evidence" regarding mental states is "objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."). As a result, plaintiffs will always seek to rely on such evidence, just as the EEOC's *amici* trade on the supposedly obvious religious nature of headscarves. *E.g.*, CAIR Amicus Br. 13-16. *But see* JA38-39; JA236-37 (EEOC expert admitting that some women wear headscarves for non-religious cultural reasons); JA130-31 (photographs of Elauf).

b. Whatever the EEOC's test means, it would create a host of practical problems. For one, employers would have to become familiar with an infinite variety of religious practices. *See Religious Garb Guidance*, *supra* (citing practices relating to hair, beards, clothing, jewelry, tattoos, etc.). Indeed, since a jury might later find that the employer must have (or should have) suspected the religious basis for the practice in question, employers would have to defend themselves by training line-level employees to sniff out hints of potentially protected conduct.

Even worse, employers would have to determine what information is relevant to identifying whether an employee's conduct is religious. This is, to put it mildly, a minefield. Imagine a woman who attends an interview wearing an unfashionably long skirt. On the EEOC's standard, can a fashion retailer turn her down? Or should it understand or suspect that the skirt is religious just because it knows that some women wear long skirts for religious reasons? If not, does the answer change if the applicant indicates that she attended an evangelical school? Does it also matter if her name is Grace and she wears a cross necklace? Or, imagine an applicant with a beard. Must an employer with a no-beard policy suspect a potential religious conflict because some religions require adherents to wear beards? What if the applicant's name is Mohammed or he appears of Middle Eastern descent?

The EEOC's test thus necessarily devolves into a totality-of-the-stereotypes standard, with employers forced to respond to probabilistic clues about one's most personal beliefs based on his appearance and history. Title VII was designed to *combat* such

stereotypes, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989) (plurality op.), not reinforce them.

3. In the end, the EEOC's suspicion standard forces employers into an impossible Catch-22. If they suspect a possible conflict between a work rule and an employee's religious practices, they must pry into those religious beliefs before acting. Otherwise, they could be liable for suspecting a conflict but not discussing accommodation. Yet the EEOC also warns that "[q]uestions about an applicant's religious affiliation or beliefs ... are generally viewed as ... problematic under federal law." *Pre-Employment Inquiries*, *supra*. Rather than ask applicants about their religion based on clues from their appearance or background, the EEOC advises employers to "ask[] the same questions of *all* applicants." *Compliance Manual*, § 12-II (emphasis added). And courts have encouraged the same, by holding that, if an employer asks such pointed questions, that could "permit an inference ... that an employer engaged in improper religion-based discrimination." Pet.App.25a.

Even the EEOC acknowledges that forcing employers to make these "unseemly" inquiries is unacceptable. (Govt.Br.30.) To avoid this problem, it suggests that an employer with "sufficient notice" of a possible conflict "can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would have difficulty complying." (*Id.*)

That is no solution at all. To begin with, it likely would not remove employers from the liability trap. In addition to explicitly religious questions, the EEOC is *also* suspicious of questions designed to flush out religious practices. For example, employers generally may not ask applicants whether they are

available during normal business hours, because of the "exclusionary effect" such questions can have on religious applicants. 29 C.F.R. § 1605.3(b)(2). If an employer asks anyway and then declines to hire someone who said she needed an accommodation, "[t]he Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject [the] applicant" and will put the "burden ... on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant." *Id.* § 1605.3(b)(3). Thus, merely by asking whether applicants could work during its ordinary schedule, an employer invites extra scrutiny if it later hires someone else. Here, the EEOC neither mentions these rules nor explains why similar inquiries into dress and grooming would be viewed differently.[8]

Beyond failing to cure the original problem, the EEOC's proposal leaves employers with no workable standards. To navigate between Scylla and Charybdis, employers would have to script detailed interview questions for every job in America—questions designed to unearth religious practices while avoiding the appearance of doing so. Drafting such questions will be hard enough for corporate counsel. It will be harder still to convey them—and the proper circumstances in which to deploy them—to thousands of line-level workers. Alternatively, employers would have to recite the entire employee

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[8] Indeed, one of its *amici* openly opposes any rule that would allow employers to ask applicants such neutral questions. *See* Nat'l Jewish Comm'n Amici Br. 13-15.

handbook to every applicant, to smoke out any possible conflict. Either is obviously impractical.

The EEOC's proposed solution would also transform Title VII into a civil-service statute. "The basic principle of at-will employment is that an employee may be terminated for a good reason, bad reason, or no reason at all," *Engquist*, 553 U.S. at 606; at-will employers accordingly have no obligation to tell employees why they took adverse action against them. But if the EEOC's suspicion standard prevails, employers will have to provide employees and applicants with notice and an opportunity to be heard before taking any adverse action that stems in part from non-compliance with a neutral work rule, so long as the employer merely suspects (or should suspect) the non-compliance might be religiously motivated. Title VII was not designed to impose onerous disclosure obligations on employers that wish to discipline at-will employees for violating legitimate, religion-neutral rules.

III. THE JUDGMENT BELOW SHOULD BE AFFIRMED, BUT AT A MINIMUM, TRIABLE FACTUAL DISPUTES PRECLUDE SUMMARY JUDGMENT FOR THE EEOC.

As shown, the judgment below should be affirmed. The EEOC cannot establish intentional discrimination, the only theory that allows the compensatory damages at issue here. *Supra*, Part I. It must prove that Abercrombie treated Elauf *differently* because of her religion, but the undisputed evidence demonstrates that it declined to hire her because she did not comply with its *religion-neutral* Look Policy. *See* JA87; JA134; JA139-40.

Alternatively, even on an accommodation theory (which the EEOC has abandoned, and which cannot support the award of damages at issue), the EEOC should, at least, have to prove that Abercrombie actually knew that Elauf's headscarf was religious in nature. *Supra*, Part II. It cannot. Cooke testified that she "did not know" Elauf's religion at the time of the interview. JA102. And Elauf never mentioned religion or her headscarf to Cooke, let alone asked for an accommodation. JA31; JA33; JA78-79. Thus, Cooke merely "figured" or "assumed" that Elauf wore her headscarf for religious reasons (JA77), and advised Johnson, at most, only that she "believe[d]" Elauf wore it for such reasons, not that she knew (JA87). Accordingly, the undisputed evidence shows that Abercrombie did not have actual knowledge of Elauf's religion or need for an accommodation.

Even if this Court adopts the EEOC's rule, however, there would remain triable disputes of fact, requiring remand—not partial summary judgment for the EEOC. Specifically, Cooke and Johnson gave conflicting accounts of the call that led to Johnson's directive not to hire Elauf. (Govt.Br.36 & n.3.) Johnson testified that Cooke never shared her belief that Elauf's headscarf was religious, and that he did not make the same assumption. JA134; JA146-47. Yet it is *Johnson's* knowledge that legally matters.

Vicarious liability under Title VII turns on the mental state of the employee actually responsible for the challenged action. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (liability only if employee with unlawful intent "proximate[ly] cause[d]" adverse action); *Reeves*, 530 U.S. at 152 (liability because biased employee was "actual decisionmaker," even

though another made "formal decision" to fire). Accordingly, when employees played different roles in the process, courts examine the mindset of the one who actually made the decision. *E.g.*, *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1306 (11th Cir. 2002) (no disparate treatment when interviewer, but not decisionmaker, knew plaintiff's religion).

Johnson, not Cooke, made the decision here. Cooke's hiring authority (Govt.Br.35) was subject to caveat: "If [she] had a question about something"—such as how to apply the Look Policy—"[she] was to ask" her store or district manager. JA55-56. Thus, although Cooke "thought [Elauf] [was] a really good candidate" (JA89), she was "unsure about the head scarf" (JA87), and so called Johnson to "ask[] [for his] permission" to hire her (JA140). Cooke told Johnson that she "thought [Abercrombie] should hire" Elauf (JA89), but Johnson nonetheless instructed that she "c[ould not] hire her" because of her noncompliance with the Look Policy (JA134). Cooke complied (JA89), even though she still wished to hire Elauf (JA91). Neither Cooke nor Johnson suggested that Cooke could ignore her manager's command.

Because Johnson was the actual decisionmaker, a triable issue exists even if "correct understanding" of the religious nature of Elauf's headscarf suffices for liability. If a factfinder believes Johnson, then he did not "correctly understand" the religious conflict, and Abercrombie would not be liable even on the EEOC's test. Remand is therefore the proper course if the Court agrees with the EEOC on the law.[9]

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[9] The EEOC erroneously contends that Cooke's beliefs are in all events imputed to Abercrombie. (Govt.Br.37 n.4.) If

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

Mark A. Knueve
Daniel J. Clark
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay St.
P.O. Box 1008
Columbus, OH 43216
(614) 464-6387

Shay Dvoretzky
Counsel of Record
Eric S. Dreiband
Yaakov M. Roth
Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

JANUARY 2015

Johnson made the decision and was "truly unaware" of the religious basis for Elauf's conduct, Abercrombie's decision could not have been *based* on her religion and "*ipso facto*" could not give rise to a disparate treatment claim. *Raytheon*, 540 U.S. at 54 n.7. Nor can Cooke's mental state somehow be transferred to Johnson on the theory that she proximately caused his decision. (Govt.Br.37 n.4 (citing *Staub*, 131 S. Ct. at 1192).) Cooke did not proximately cause anything. Just the opposite: She *wanted* to hire Elauf, but was thwarted by Johnson. *See supra* at p.12.

STATUTORY & REGULATORY ADDENDUM

No. 14-86

Equal Employment Opportunity Commission,
Petitioner

v.

Abercrombie & Fitch Stores, Inc.,
Respondent

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42 U.S.C. § 1981a(a)

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery.

(1) Civil rights. In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, and provided that the complaining party cannot recover under section 1977 of the Revised Statutes, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990, and section 505(a)(1) of the Rehabilitation Act of 1973, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable

accommodation, or section 102 of the Americans with Disabilities Act of 1990, or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C. § 2000e (Excerpts)

§ 2000e. Definitions

* * * * *

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

* * * * *

42 U.S.C. § 2000e-2 (Excerpts)

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be

an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended.

* * * * *

42 U.S.C. § 2000e-5 (Excerpts)

§ 2000e-5. Enforcement provisions

* * * * *

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or

advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court–

(i) may grant declaratory relie injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * * * *

42 U.S.C. § 12112 (Excerpts)

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is

administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

* * * * *

29 C.F.R. § 1605.1

§ 1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j).

29 C.F.R. § 1605.2 (Excerpts)

§ 1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of title VII of the Civil Rights Act of 1964.

(a) Purpose of this section. This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) Duty to accommodate. (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

* * * * *

(c) Reasonable accommodation.

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

* * * * *

29 C.F.R. § 1605.3

§ 1605.3 Selection practices.

(a) Scheduling of tests or other selection procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries which determine an applicant's availability to work during an employer's scheduled working hours.

(1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment

opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of

the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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EEOC v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49 (1st Cir. 2002) 18
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Smith v. *City of Jackson*, 544 U.S. 228 (2005) 19

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42 U.S.C. 2000e-2(k) 19
29 C.F.R.:
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U.S. Equal Emp't Opportunity Comm'n:
2 EEOC Compl. Man. (July 22, 2008) 4, 8, 22
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In the Supreme Court of the United States

No. 14-86

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The question presented is whether an employer can be liable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for refusing to hire an applicant based on a "religious observance and practice" only if the employer (i) had "actual knowledge" that a religious accommodation was required, and (ii) the employer's actual knowledge resulted from direct, explicit notice from the applicant. See Pet. i. The Tenth Circuit divided from other courts when it answered in the affirmative.

Respondent says little in defense of the court of appeals' approach, for that approach has little to recommend it. The *source* of an employer's knowledge has no bearing on whether its resulting action is "because of" a religious practice. And an action taken "because of" a religious practice does not cease to be

so when the employer "correctly infers" rather than "knows" that the practice is religious.

Respondent instead spends most of its brief trying to avoid the question presented, misstating the government's position in the process. First, respondent argues for the first time that an employer's refusal to hire an applicant based on a religious practice that the employer could accommodate is not a refusal to hire an applicant "because of" religious practice at all—and therefore does not violate Section 703(a)(1). Respondent implies (and respondent's amicus states outright) that these are simply disparate-impact claims, barred under a different statutory prohibition. But that is at odds with the text of the statute and this Court's precedent, and it obscures the basic differences between the religious-accommodation claims here and disparate-impact claims.

Second, respondent contends for the first time that the compensatory damages the jury awarded are unavailable because religious-accommodation cases do not involve "intentional discrimination" under 42 U.S.C. 1981a(a)(1). Respondent long ago forfeited this argument, which was neither pressed nor passed upon below nor raised in the brief in opposition to certiorari. Nor is there merit to respondent's suggestion that its forfeiture is excused by a purported shift in the government's theory. The government's theory now is just what it has always been—under a failure-to-accommodate theory, respondent violated Section 703(a)(1) and committed "intentional discrimination" within the meaning of Section 1981a(a)(1) when it intentionally refused to hire Samantha Elauf because of her hijab, after inferring correctly that Elauf wore the hijab for religious reasons.

A. The Court Of Appeals Unjustifiably Limited Title VII Protections

1. The court of appeals' approach cannot be justified

As the Equal Employment Opportunity Commission (EEOC) explained in its opening brief (Br. 22-24), when Congress made "religious practice" a protected attribute under Title VII, it prohibited employers from doing what respondent has done here—intentionally refusing to hire an applicant based on what it correctly understands to be the applicant's religious practice, absent a showing of undue hardship. That is because an employer who makes such a hiring decision has refused to hire an applicant "by reason of" or "on account of" the applicant's religious practice, *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2527 (2013) (citation omitted). When an employer has intentionally refused to accommodate a religious practice, it makes no difference whether the employer's correct understanding of the religious practice came from the applicant or from elsewhere, and it makes no difference whether the employer "knew" or instead correctly "inferred" the religious nature of the practice. Either way, there is an intentional failure to accommodate. Either way, the employer has done just what the statute precludes.

Respondent offers (Br. 42-56) no textual defense of the court of appeals' limitations on religious-accommodation claims. Instead, respondent tries to cobble together a defense of the ruling below based on precedent, agency construction, and policy.

Precedent is no help. Respondent identifies no case finding Title VII inapplicable to an employment decision that was based on what the employer correct-

ly understood to be a religious practice (other than cases applying the undue hardship exception). On the contrary, as set out in the petition for a writ of certiorari (Pet. 17-22), other courts have found Title VII applicable so long as an employer had "enough information about an employee's religious needs" from any source "to permit the employer to understand the existence of a conflict between the employee's religious practice and the employer's job requirements." *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); see also *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013). Courts have found that standard satisfied based on evidence that employers correctly understood a conflict existed. See *Dixon*, 627 F.3d at 855-856; *Brown*, 61 F.3d at 654.

Nor does the court of appeals' ruling find support in principles of agency deference; the EEOC rejects the Tenth Circuit's approach. See EEOC Br. 30-34. Respondent disparages the EEOC's view as a "litigation-driven" response to this case (Br. 45). That is incorrect. As the EEOC's brief notes (Br. 33), the EEOC has previously explained that employers have Title VII obligations whenever they are "on notice" of the need for a religious accommodation. It has offered as examples of adequate notice cases in which employees provided no explicit verbal notice. See 2 EEOC Compl. Man. § 12-IV(A)(1), at 47 n.120 (July 22, 2008) (*EEOC Compliance Manual*). And in explaining the legal standard, the EEOC has repeatedly stated that "an employer need have 'only enough information

about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'" *EEOC Compliance Manual* § 12-IV(A)(1), at 47 n.120 (quoting *Heller*, 8 F.3d at 1439); see EEOC Mem. in Opp. to Def's Mot. for Summ. J. at 14-15, *EEOC* v. *GKN Driveline N. Am. Inc.*, No. 1:09CV654, 2010 WL 5093776 (M.D.N.C. 2010) (same standard).

Ignoring what the EEOC has actually said, respondent focuses on what it describes as a "negative implication" from an EEOC regulation noting employers *do* have a duty to accommodate "after an employee or prospective employee notifies the employer" of the need for an accommodation. See Resp. Br. 43-44 (citation omitted) (discussing 29 C.F.R. 1605.2(c)(1)). But such a "negative implication" is hardly appropriate when other guidance expressly states that duties can arise without explicit, verbal notice from an employee. Respondent's claim of inconsistency on the EEOC's part is thus baseless.

Respondent fares no better in its appeal to policy. As the EEOC explained (Br. 24-28), the court of appeals' limitations would undercut the policies at the heart of Title VII. They would permit employers to intentionally refuse the very religious accommodations that Congress sought to require. And they would undermine Congress's objective of promoting "bilateral cooperation" to reconcile religious and workplace needs. *Id.* at 26-27 (citation omitted).

Respondent attempts to justify the Tenth Circuit's verbal-notice requirement by suggesting (Br. 46-48) that an employer who correctly perceives a conflict between work rules and an applicant's religious prac-

tice should have no duty to try to accommodate unless the applicant has "first rais[ed] the issue of religious accommodation" because "[t]he employee will usually be best suited" (Br. 43) to recognize the conflict.[1] As explained in the EEOC's opening brief (Br. 29), however, conflicts between work rules and religious practice will *sometimes* be more easily identified by employers, and *sometimes* by applicants or employees. Respondent's hypothesis that an applicant is more likely to recognize a conflict in "the *typical* case" (Br. 48) is no reason to free employers from the obligation to explore accommodation in the *other* cases (such as this one) where the employer, not the applicant, understands the conflict.

Further, nothing beyond ipse dixit supports respondent's assertion that it takes "a rare coincidence of events" (Br. 48) for the employer to have the superior understanding of a conflict between religious practice and work rules. Many faiths have distinctive garb and grooming requirements, and it blinks reality to suggest that respondent's hiring manager was uncommonly perceptive in recognizing the character of a hijab. Nor is there reason to think most employers outline all their policies during initial job interviews, so applicants may identify possible conflicts from the outset. Cf. *id.* at 55-56 (deriding approach in which employers "recite the entire employee handbook to every job applicant").

Respondent's approach is particularly troubling because whether employers or applicants are most

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[1] Respondent has abandoned the portion of the court of appeals' ruling requiring that this verbal notice come from the applicant or employee. Compare Pet. App. 28a-30a with Resp. Br. 19, 47 n.6.

likely to learn of a religious conflict depends principally on the structure of encounters that are largely within the employer's control. Respondent would provide employers who are disinclined to accommodate religious practice with a ready means to evade the statutory protections, simply by structuring job interviews so that applicants do not learn of potential conflicts or have the opportunity to "rais[e] the issue of religious accommodation" (Resp. Br. 46).

Respondent next expresses concern (Br. 52-53) that factfinders will consider objective circumstances in assessing whether an employer had, in fact, correctly understood a religious conflict. In view of this, respondent contends (Br. 53) Title VII's antidiscrimination protections should be curtailed lest employers feel the need "to become familiar with an infinite variety of religious practices * * * since a jury might later find that the employer must have (or should have) suspected the religious basis for the practice in question." This Court's precedents offer no support for the proposition that antidiscrimination protections should be limited to simplify jury factfinding (much less to avoid the proffered horrible that employers may "become familiar with * * * religious practices" as a precautionary measure). Judge or jury determinations about employers' mental states are a routine part of the inquiry in employment discrimination cases. Yet this Court has never curtailed antidiscrimination protections to avoid those inquiries, and it has rejected demands for special rules of proof in Title VII cases. See *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98-101 (2003) (rejecting requirement of "direct evidence" in mixed-motive cases).

Respondent also seeks to defend the court of appeals' "actual knowledge" holding on the ground (Br. 54-56) that it is more consistent with public policy objectives for an employer who lacks the certainty required by the Tenth Circuit to *refuse to hire* an applicant than to inquire further about a conflict. That suggestion is contrary to Title VII's objectives—protecting religious practice and encouraging dialogue regarding possible accommodation. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted).

Nor can respondent pin that approach on EEOC guidance because, as the EEOC has explained (Br. 30), it does not discourage employers perceiving a religious conflict from seeking to confirm whether such a conflict exists. Although "[q]uestions about an applicant's religious affiliation and beliefs" are "*generally* * * * non job-related," see EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs*, http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Feb. 16, 2015) (emphasis added), such inquiries *are* "job-related" when they bear on whether an employee can comply with the employer's work rules, with or without a reasonable accommodation. Cf. *EEOC Compliance Manual* § 12-IV(A)(1), at 47 (encouraging employer to "ask the employee to explain the religious nature of the practice and the way in which it conflicts with a work requirement" when employer is skeptical of accommodation claim). In any event, an employer believing that an applicant's faith would conflict with a work rule need not inquire into the employee's faith to confirm or dispel the conflict. See EEOC Br. 30. It can simply advise the applicant of the relevant rule

and ask whether (and why) the applicant would have trouble complying. See *ibid.*

Finally, it is respondent's approach and not that of the EEOC that invites religious stereotyping. Cf. Resp. Br. 53-54. By creating a safe harbor for employers acting on their *inferences* about an applicant's religious conduct, respondent gives employers reluctant to accommodate religious practices every incentive to act on guesses and suspicions. This case illustrates that point. Respondent declined to hire Elauf not because respondent requires job applicants to be in compliance with its Look Policy during their interviews—respondent does not—but because it correctly inferred based on Elauf's hijab that she would need a religious accommodation in order to comply with the Look Policy in the future. A reading of Title VII that gives employers a free pass to act on religious stereotypes, so long as they do not confirm them, is not a sensible reading of the Act.

2. Section 703(a)(1) reaches a refusal to accommodate a religious practice that the employer correctly understands to be religious, whether or not the refusal is "based on the religious nature *of the practice"*

Unable to justify the Tenth Circuit's approach within the framework of existing law, respondent instead seeks to create diversion. Respondent asserts (Br. 33-34) that the prohibition on refusing to hire an applicant "because of" the applicant's "religious practice" under Section 703(a)(1) of Title VII reaches only refusals that are "based on the *religious nature* of the practice." Thus, respondent contends, an employer who deliberately refuses to hire an applicant based on the applicant's Sabbath observance or religious garb,

for instance, does not refuse to hire the applicant "because of" the applicant's "religious practice," if the employer would *also* have refused to hire a person who engaged in a similar, secular practice. *Ibid.*

This construction of Section 703(a)(1) was not raised at any point below. And respondent is incorrect to suggest that its failure to do so is justified because the EEOC has changed *its* theory. From the very start and through briefing in this Court, the EEOC has pursued the same theory: Respondent refused to hire Elauf "because of" religious practice when it failed to accommodate her practice of wearing a headscarf. Thus, the EEOC asserted below that respondent violated Section 703(a)(1) by refusing to hire Elauf "because of" religion—in particular, because of religious practice that respondent could accommodate without undue hardship. Compl. 2-3; EEOC Amended Mot. for Partial Summ. J. 16-17; EEOC C.A. Br. 21-22, 23-24. There has been no change in theory in this Court. See EEOC Br. 18-19, 22, 23.

Nothing in the EEOC's argument that failures to accommodate religious practice can be described as disparate treatment shifts the EEOC's underlying claim or suggests that EEOC has "abandoned" (Resp. Br. 18) its failure-to-accommodate claim. As the EEOC explained (Br. 23-24), this Court has used the term "disparate treatment" to refer to an employer's deliberate refusal to hire an applicant because of a protected characteristic. A failure-to-accommodate claim meets this definition, because it is an allegation that an employer refused to hire an applicant because of a protected characteristic—religious practice that

an employer could accommodate.[2] But whether "failure to accommodate" claims are assigned this label or not, the EEOC has consistently pressed, and continues to press, the same claim that respondent violated Title VII by refusing to hire Elauf "because of" a religious practice that it could accommodate without undue hardship. There is no change in position to justify respondent's failure to argue previously that a refusal to hire an employee is not "because of" religious practice if it is pursuant to a work rule that sweeps in religious and secular practices alike.

In any event, this argument is foreclosed by precedent, text, and history. As to precedent, respondent's approach cannot be squared with this Court's principal decision construing religious practice—or nearly four decades of decisions after that. In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), a discharged employee brought a claim under the provision of Title VII invoked in this case, Section 703(a)(1), whose sole command is that employers refrain from employment actions "because of" protected attributes, including (subject to a hardship exception) religious practice. *Id.* at 71. The employee asserted that he had been unlawfully discharged "because of" a religious practice that could have been accommodated without undue hardship—as necessary to trigger liability under Section 703(a)(1)—because he had been

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[2] Put another way, Congress wanted employees with religious practices that could be accommodated without undue hardship to be treated the same as employees who did not observe the religious practice. Here, for example, Elauf should be treated the same (absent undue hardship) as an applicant who did not wear a headscarf. Failure to accommodate thus *is* "disparate treatment" in the relevant sense.

discharged for Sabbath observance that conflicted with the employer's neutral, seniority-based scheduling policy. *Id.* at 68-69. In other words, the employee raised precisely the sort of claim that respondent contends is not discrimination "because of" a religious practice.

In addressing that claim, this Court squarely rejected respondent's construction of what it means to fire or refuse to hire an employee "because of" a "religious practice." It explained that claims that an employer failed to make an exception to a work rule reaching secular and religious practices alike *do* fall within Section 703(a)(1)'s prohibition. "The intent and effect of" the provision defining religion to include religious practice that could be accommodated, this Court explained, "was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74. Accordingly, the employer's liability turned exclusively on the undue-hardship exception. *Id.* at 75-85. That hardship inquiry would have been unnecessary if respondent were correct that employment actions based on rules sweeping in religious and non-religious practices are not "because of" religious practice at all. In the four decades since *Hardison*, federal courts have uniformly recognized that failure to accommodate religious practice is discrimination "because of" religious practice under Section 703(a)(1). See, *e.g.*, *Sanchez-Rodriguez* v. *AT&T Mobility P.R., Inc.*, 673 F.3d 1, 11-12 (1st Cir. 2012); *Baker* v. *Home Depot*, 445 F.3d 541 (2d Cir. 2006); *Protos* v. *Volkswagen of Am., Inc.*, 797 F.2d 129 (3d Cir.), cert. denied, 479

U.S. 972 (1986); *EEOC* v. *Ithaca Indus.*, 849 F.2d 116 (4th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988); *David* v. *Fort Bend Cnty.*, 765 F.3d 480, 484-485 (5th Cir. 2014), petition for cert. pending, No. 14-847 (filed Jan. 15, 2015); *Smith* v. *Pyro Min. Co.*, 827 F.2d 1081, 1084-1085 (6th Cir. 1987), cert. denied, 485 U.S. 989 (1988); *EEOC* v. *Ilona of Hung., Inc.*, 108 F.3d 1569, 1574-1575 (7th Cir. 1997); *Brown*, 61 F.3d at 653-654; *Heller*, 8 F.3d at 1437-1438; *Thomas* v. *National Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-1155 (10th Cir. 2000); *Beadle* v. *City of Tampa*, 42 F.3d 633, 636 (11th Cir.), cert. denied, 515 U.S. 1152 (1995).

This construction follows from the statutory text. Respondent's theory that an employee is dismissed "because of" religious practice only if the employer acts based on the religiosity of the practice is contradicted by Congress's inclusion of a hardship exception in the definition of protected "religious practice." See 42 U.S.C. 2000e(j) (religion includes religious practice "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"). That exception would be unnecessary if acting because of "religious practice" meant singling out practices based on their "*religious nature*" (Resp. Br. 34), because it cannot cause "undue hardship" to refrain from treating some employees less favorably based simply on the religious faith underlying their conduct.

Finally, respondent's understanding is contrary to the history of Title VII's religious-practice protection. As this Court has recognized, *Hardison*, 432 U.S. at 73, 74 n.9, and respondent concedes (Br. 36-37), the

purpose of the amendment providing protection against employment decisions based on "religious practice" was to bar dismissals based on policies that sweep in religious and secular practices alike—not policies that single out religious persons "based on the *religious nature* of the practice," Resp. Br. 34. The "religious practice" protection was enacted after the EEOC and some courts divided over whether employers who dismissed Sabbath observers because they could not comply with generally applicable scheduling rules had engaged in religious discrimination. Compare 29 C.F.R. 1605.1 (1968) (concluding that employers discriminate based on religion if they fail to afford reasonable accommodations) with *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 329-331 (6th Cir. 1970) (rejecting that approach), aff'd by an equally divided court, 402 U.S. 689 (1971) (per curiam); *Riley* v. *Bendix Corp.*, 330 F. Supp. 583, 589-590 (M.D. Fla. 1971) (same), rev'd, 464 F.2d 1113 (5th Cir. 1972).

To resolve that debate, Congress clarified that an employer acts unlawfully when it denies employment based on religious practice that the employer could accommodate without undue hardship—even when the employer would also deny employment to an applicant engaged in similar, secular conduct. See 118 Cong. Rec. 705-706 (1972); *id.* at 4940; *Hardison*, 432 U.S. at 73, 74 n.9 (noting that Congress sought to "resolve by legislation" the issue in *Dewey* and *Riley* and to "requir[e] some form of accommodation"). Given this purpose, it makes no sense to read the amendment, as respondent would (Br. 34), as aimed at decisions motivated by the "religious nature of the practice."

Respondent's bid to overturn nearly four decades of precedent allowing accommodation claims under

Section 703(a)(1) would significantly curtail protection of religiously observant employees. The disparate-impact protections that would remain under Section 703(a)(2) are no substitute for the long-established protections under which individual employees can seek accommodation without statistical proof pertaining to the effects of an employer's practices on protected groups. Section 703(a)(2) is a poor fit for such individuals' claims: It is directed not at particular hiring decisions, but at broad employment practices. Compare 42 U.S.C. 2000e-2(a)(1) (making it unlawful "to fail or refuse to hire or to discharge any *individual*" based on protected attributes) (emphasis added) with 42 U.S.C. 2000e-2(a)(2) (making it unlawful "to limit, segregate, or classify [employer's] employees or applicants" in prohibited ways). And it requires not simply proof as to the effect of an employer's rules on a particular employee, but rather evidence that the employer's practices had "significant adverse effects on [a] protected *group*[]." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986-987 (1988) (discussing *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)); see also, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 246-247 (1976) (requiring "substantially disproportionate" impact on protected group). This traditionally requires evidence of "statistical disparities, rather than specific incidents," *Watson*, 487 U.S. at 987—evidence that individual applicants seeking accommodations are unlikely to have, and evidence that might not even be sensible to seek when an applicant's religious practice reflects beliefs that are sincerely held but idiosyncratic. In short, respondent's reading of Section 703(a)(1) is contrary to text and precedent—and would dramat-

ically undercut longstanding religious-practice protections.

B. Respondent Is Not Entitled To Relief Based On A Newly Minted Challenge To Damages Under 42 U.S.C. 1981a

Respondent next urges this Court to decide this case by accepting yet another claim it advances for the first time in this Court: compensatory damages under 42 U.S.C. 1981a(a)(1) are unavailable for religious-accommodation claims. That argument is forfeited. In any event, it lacks merit.

1. Respondent has forfeited this claim

This Court's general rule is that it will not decide an issue raised by a respondent in its merits brief that was neither presented nor decided below nor raised in the brief in opposition to certiorari. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2857 (2011). Respondent's belated assertion that the EEOC's religious-discrimination claim in this case was not one of "intentional discrimination" under Section 1981a(a)(1) is forfeited under these principles.

The only justification respondent offers for waiting until its merits brief in this Court to raise this claim is an assertion that respondent had no reason previously to challenge the availability of compensatory damages under Section 1981a. This suggestion is mystifying. The EEOC has asserted throughout this case that it was entitled to compensatory damages under 42 U.S.C. 1981a—a remedy available only for claims of "intentional discrimination," 42 U.S.C. 1981a(a)(1). See Compl. 1, 3-4 (D. Ct. Doc. 2). The EEOC also demanded a jury trial, which is available only for claims of intentional discrimination, 42 U.S.C.

1981a(c). See Compl. 4. For good measure, the EEOC explicitly described its claim as one of "intentional" discrimination. *Id.* at 3.

Despite the EEOC's clear position, respondent never challenged the EEOC's right to a jury trial and compensatory damages under Section 1981a. To the contrary, respondent prepared jury instructions and made motions in limine premised on the availability of Section 1981a(a)(1) damages. See Def.'s Requested Jury Instructions (D. Ct. Doc. 145) 4-5, 6-10 (proposing jury instructions regarding availability of compensatory and punitive damages); Def.'s Mot. in Limine to Exclude Evidence of Punitive Damages 3-9 (D. Ct. Doc. 51) (litigating whether the EEOC could establish entitlement to punitive damages under standards in Section 1981a). Then, after the jury awarded compensatory damages, respondent raised no Section 1981a issue on appeal. For good measure, respondent failed to mention a Section 1981a-based defense in its brief in opposition to certiorari.

This case implicates with unusual strength the interests underlying this Court's rules concerning claims outside the question presented. Respondent has "forfeited" its claim at every stage. *United States* v. *Jones*, 132 S. Ct. 945, 954 (2012) (citing *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002)). As a result, no court has considered or passed upon respondent's Section 1981a(a)(1) argument. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (noting Court is a "court of review, not of first view"). And because respondent failed to even give notice of this argument in its brief in opposition to certiorari, neither the EEOC nor amici had a fair opportunity to discuss Section 1981a prior to this reply brief. See

South Cent. Bell Tel. Co. v. *Alabama*, 526 U.S. 160, 171 (1999).

2. Respondent's construction lacks merit

In any event, respondent's claim lacks merit. Since the enactment of Section 1981a, an employer's deliberate refusal to hire an employee because of religious practice that it could reasonably accommodate has been uniformly considered "intentional discrimination" under Section 1981a(a)(1). That understanding has been so widely shared that, while EEOC has routinely sought jury trials and compensatory damages in cases involving religious-accommodation claims, only a pair of defendants appear to have questioned whether such claims pertain to conduct that is "intentional"—and those challenges were swiftly rejected. *EEOC* v. *ABM Sec. Servs.*, No. 12-cv-4075 (E.D. Pa. Mar. 21, 2013); *Vetter* v. *Farmland Indus., Inc.*, No. C94-3008, 1996 WL 33423409, at *2 (N.D. Iowa Sept. 17, 1996); see *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 57 n.9 (1st Cir. 2002) (noting EEOC's "usual practice" in religious-accommodation cases of seeking jury trial). Meanwhile, jury verdicts and compensatory damage awards concerning such claims have been regularly upheld. See, *e.g.*, *id.* at 57; *Sturgill* v. *United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2008).

The reason is plain. Section 1981a permits compensatory damages against (among others) a respondent who "engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703." Section 703(a)(1) of Title VII, under

which this suit was brought, is an "intentional discrimination" provision. *Ricci*, 557 U.S. at 577; see EEOC Br. 23-24.

Disparate-impact claims are conceptually distinct causes of action set forth in a different portion of the statute. Disparate-impact claims derive from Section 703(a)(2)'s bar on practices that "limit, segregate, or classify * * * applicants for employment in any way which would * * * adversely affect his status as an employee, because of" the protected characteristics, 42 U.S.C. 2000e-2(a)(2), since this language—unlike the language of Section 703(a)(1)—"focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith* v. *City of Jackson*, 544 U.S. 228, 235 & n.6 (2005) (plurality opinion); *id.* at 243-247 (Scalia, J., concurring in the judgment); see also *Watson*, 487 U.S. at 991.[3] Further, disparate-impact protections have expansive contours that respondent does not embrace: A hallmark is that an employer can violate them without knowledge or intent, simply because the effect of an employer's practice was to disadvantage a protected group. See, *e.g.*, *Griggs*, 401 U.S. at 432-433; see also 42 U.S.C. 2000e-2(k) (codifying disparate-impact protections). Revealingly, while respondent seeks to apply the label of "disparate impact" to the religious-practice claim that the EEOC has raised under Sec-

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[3] Contrary to respondent's suggestion (Br. 41), the government's amicus brief in *Texas Department of Housing & Community Affairs* v. *Inclusive Community Project, Inc.*, No. 13-1371 (argued Jan. 21, 2015), reflects this understanding of the source of disparate-impact protection under Title VII. See *id.* at 19 (noting disparate-impact protection is under "Section 703(a)(2) of Title VII").

tion 703(a)(1), respondent's account of the contours of Section 703(a)(1) does not correspond to disparate-impact liability at all. Rather than holding employers accountable for failure to accommodate religious practice under Section 703(a)(1) regardless of whether the employer understood the nature of the practice, respondent would require "actual knowledge" based on explicit verbal notice. This is disparate-impact liability in name only.

In defense of its novel approach, respondent invokes (Br. 25-26) *Employment Division* v. *Smith*, 494 U.S. 872 (1990). This is perplexing. *Smith* established that the Free Exercise Clause of the First Amendment does not generally require that States accommodate religious practice through exceptions to generally applicable laws. But Title VII's prohibition on employment decisions based on "religious practice" *does* require employers to accommodate religious practice through exceptions to generally applicable work rules. Title VII goes beyond what the Free Exercise Clause requires—as *Smith* recognized legislatures might do. *Id.* at 890.

Respondent is equally mistaken in suggesting (Br. 24-25) that dicta in *Hardison* establish that a refusal to accommodate religious practice cannot qualify as intentional discrimination. *Hardison* established that Title VII's intentional-discrimination provision does reach the firing of an employee based on religious practice that could be accommodated without undue hardship. See 432 U.S. at 77-81. Its later discussion of intentional discrimination concerned the meaning of a separate defense. Under Section 703(h), even a hiring decision that would otherwise be barred is not actionable if it arises from the application of a seniori-

ty system not itself designed with a discriminatory purpose. See *id.* at 82 (suggesting Section 703(h) would be applicable in *Hardison* because employer's "seniority system was not designed with the intention to discriminate against religion"). *Hardison*'s discussion of Section 703(h) simply reflects that some deliberate refusals to accommodate religious practice otherwise banned as intentional discrimination are saved because they are the product of seniority systems designed with no such discriminatory intent.

Respondent next points to lower court decisions (Br. 26-27) that describe "religious accommodation claims" as distinct from "intentional discrimination" claims. It is unsurprising that some courts have developed a separate label for religious-accommodation claims, because such claims involve questions of proof concerning notice and the feasibility of accommodation that are not present in other cases under Section 703(a)(1). But these courts' application of a unique label to accommodation claims does not shed light on the classification of those claims under Section 1981a(a)(1)—which divides all Title VII claims into the categories of "intentional discrimination" and "disparate impact" discrimination. 42 U.S.C. 1981a(a)(1). Respondent has identified no court which has described an accommodation claim as a claim of "disparate impact." On the contrary, as noted above, courts and litigants applying Section 1981a(a)(1) have for decades understood that accommodation claims fall into the "intentional discrimination" category. That consensus is correct because, unless the undue-hardship exception applies, an employer who refuses to hire an employee based on what it correctly understands to be a religious practice has intentionally

denied employment based on an attribute protected under Title VII.[4]

Finally, respondent suggests (Br. 28-29) that this uniformly accepted approach creates illogical differences between the treatment of religious accommodation under Section 1981a(a)(1) and the treatment of disability accommodation under Section 1981a(a)(2). Respondent notes that disability-accommodation claims are subject to a limited good-faith defense, and religious-accommodation claims are not. See 42 U.S.C. 1981a(a)(3). In fact, however, it is respondent's approach that would generate inexplicable asymmetries. Congress's choice to limit the good-faith provision is readily explained by the more onerous and

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[4] Similarly, as respondent notes (Br. 30), the EEOC has often used the term "disparate treatment" in a manner narrower than this Court, to connote only one species of intentional discrimination. This Court's decisions have generally treated "disparate treatment" as synonymous with "intentional discrimination," explaining that disparate treatment "occur[s] where an employer has 'treated [a] particular person less favorably than others because of' a protected trait." *Ricci*, 557 U.S. at 577 (citation omitted); see also *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). In contrast, like some lower courts, the EEOC has sometimes used the term "disparate treatment" more narrowly, distinguishing it from other species of intentional discrimination, such as harassment, retaliation, and denial of accommodation. See *EEOC Compliance Manual* § 12-II, at 21. These finer divisions are of little relevance under Section 1981a(a)(1), with its bipartite division of all discrimination claims. EEOC has distinguished accommodation claims from disparate-impact claims. See *id.* at 21 n.56 (contrasting "reasonable accommodation/undue hardship" claims with "disparate impact analysis"). And as noted *infra*, EEOC has for many decades treated accommodation claims as triggering the jury trial right and damages remedies available only for "intentional discrimination" under Section 1981a.

complex accommodation duties under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* Compare 42 U.S.C. 12111(10) (setting out multi-factor test for "undue hardship"), with *Hardison*, 432 U.S. at 84 (concluding that undue hardship exception applies to religious accommodations if employer would "bear more than a *de minimis* cost"). In contrast, respondent offers no explanation for the starker difference on its view—employees making disability-accommodation claims are able to obtain compensatory damages, while those raising religious-accommodation claims are denied that remedy uniformly. For all these reasons, respondent's forfeited claim lacks merit.

C. The Decision Below Should Be Reversed

Under the correct standard, the EEOC was entitled to partial summary judgment as to respondent's notice here. Each relevant witness agreed that assistant manager Heather Cooke "had responsibility for hiring decisions at the Abercrombie Kids store." Pet. App. 117a n.10 (district court at summary judgment); J.A. 53-56, 101, 133. And Cooke acknowledged that she "fail[ed] or refuse[d] to hire" Elauf, 42 U.S.C. 2000e-2(a)(1), because of a hijab that Cooke correctly understood reflected Elauf's religious practice. J.A. 77, 90-91.

Respondent notes that Cooke would consult with others when she was unclear about respondent's policies, see J.A. 55-56, and that when she did so here, district manager Randall Johnson told her that headscarves were prohibited and that employees could not be hired if they were out of compliance, see J.A. 134 (Johnson); see also J.A. 87-90 (Cooke). But the fact that Cooke, against her own better judgment, did not

hire Elauf because she understood that she had to adhere to respondent's Look Policy simply underscores the reasons for respondeat superior liability in cases like this. It certainly does not undercut the undisputed testimony that it was "solely" Cooke who had the authority to extend or refuse job offers for sales positions, and that Cooke refused to extend an offer here because of what she correctly understood to be a religious practice. J.A. 133; see also J.A. 55 (Cooke made "the final decision on whether an applicant for a model position would be hired"). Accordingly, the EEOC was entitled to summary judgment concerning the notice element of its claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2015

No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AND OTHER ORGANIZATIONS SUPPORTING CIVIL RIGHTS FOR AMERICAN MUSLIMS IN SUPPORT OF PETITIONER

ABED A. AYOUB
Counsel of Record
YOLANDA C. RONDON
ANDREW W. COX
AMERICAN-ARAB
ANTI-DISCRIMINATION COMMITTEE
1990 M Street NW, Suite 610
Washington, DC 20036
(202) 244-2990
aayoub@adc.org

December 10, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a religious observance and practice only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the application or employee.

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TABLE OF AUTHORITIES

CASES Page(s)

Albert v. Smith's Food & Drug Ctrs., Inc.,
356 F. 3d 1242 (10th Cir. 2004)..... 8

Anderson v. General Dynamics Convair Aerospace Division,
589 F.2d 397 (9th Cir. 1978)..... 27

Ansonia Bd. of Educ. v. Philbrook,
479 U.S. 60 (1986)..... 8

Barnett v. U.S. Air, Inc.,
200 F. Supp. 2d 151 (E.D.N.Y. 2002)..... 6, 7

Barnett v. U.S. Air, Inc.,
228 F.3d 1105 (9th Cir. 2000)..... 6

Brown v. Polk County,
61 F. 3d 650 (8th Cir. 1995)..... 4

Bultemeyer v. Fort Wayne Community Sch.,
100 F.3d 1281 (1996) 7

Burwell v. Hobby Lobby Stores, Inc.,
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Coley v. Grant County,
36 Fed. Appx. 242 (9th Cir. 2002) 6, 7

Council on Am.-Islamic Relations, Mich. v. Callahan,
2010 U.S. Dist. LEXIS 41924 (E.D. Mich. 2010)..... 29

Dewey v. Reynolds Metal Co.,
429 F.2d 324 (6th Cir. 1970)..... 3, 4

Dixon v. Hallmark Cos.,
627 F.3d 849 (11th Cir. 2010)..... 16

TABLE OF AUTHORITIES—Continued

Page(s)

Eddie Thomas v. Review Bd. of the Ind. Emp't Sec. Div.,
450 U.S. 707 (1981) 15, 29

EEOC v. Abercrombie & Fitch Stores, Inc.,
731 F.3d 1106 (10th Cir. 2013) ..... *passim*

EEOC v. Abercrombie & Fitch Stores, Inc.,
798 F. Supp. 2d 1272 (N.D. Okla. 2011) 4, 30, 31, 32

EEOC v. Abercrombie & Fitch Stores, Inc.,
966 F. Supp. 2d 949 (N.D. Cal. 2013) 26

EEOC v. Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids,
No. 10-cv-03911-EJD, 2013 U.S. Dist. LEXIS 51905 (N.D. Cal. 2013) 26, 31, 33

EEOC v. Alamo Rent-A-Car LLC,
432 F. Supp. 2d 1006 (D. Ariz. 2006) . 16, 19, 28

EEOC v. Sears, Roebuck & Co.,
417 F.3d 789 (7th Cir. 2005) 7, 8

EEOC v. Sunbelt Rentals, Inc.,
521 F.3d 306 (4th Cir. 2008) 21

EEOC v. White Lodging Services Corp.,
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Ford v. McGinnis,
352 F.3d 582 (2d Cir. 2003) 15

Forde v. Baird,
720 F. Supp. 2d 170 (D. Conn. 2010) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Frazee v. Ill. Dep't of Employment Sec.,
489 U.S. 829 (1989) 15, 16, 17

Furnco Constr. Co. v. Waters,
438 U.S. 567 (1978) 6

Goldman v. Weinberger,
475 U.S. 503 (1986) 17

Gonzalez v. Abercrombie & Fitch Stores, Inc.,
2011 U.S. Dist. LEXIS 67356 (N.D. Cal. 2011) 24, 25, 26

Heller v. EBB Auto Co.,
8 F.3d 1433 (9th Cir. 1993) 4

Jacques v. DiMarzio, Inc.,
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Kaukab v. Harris,
2003 U.S. Dist. LEXIS 13710 (N.D. Ill. 2003) 29

Lee v. ABF Freight Sys.,
22 F.3d 1019 (10th Cir. 1994) 27

Lewis v. New York City Transit Auth.,
2014 U.S. Dist. LEXIS 46471 (E.D.N.Y. 2014) 28

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) ..... *passim*

Mohamed-Sheik v. Golden Foods / Golden Brands,
No. Civ. A. 303 (W.D. Ky. 2006) 23

TABLE OF AUTHORITIES—Continued

Page(s)

Patrick v. Lefevre,
745 F.2d 153 (2d Cir. 1984) 15

Philbrook v. Ansonia Bd. of Educ.,
757 F.2d 476 (2d Cir. 1985) 16

Riley v. Bendix Corp.,
402 U.S. 689 (1971) 3, 4

Stover v. Martinez,
382 F.3d 1064 (10th Cir. 2004) 6

Thomas v. National Ass'n of Letter Carriers,
225 F.3d 1149 (10th Cir. 2000) 16

Toledo v. Nobel-Sysco, Inc.,
892 F. 2d 1481 (10th Cir. 1989) 27

Tooley v. Martin-Marietta Corp.,
648 F.2d 1239 (9th Cir. 1981) 27

U.S. Airways, Inc. v. Barnett,
535 U.S. 391 (2002) 6

U.S. Postal Serv. Bd. of Governors v. Aikens,
460 U.S. 711 (1983) 6

U.S. v. New York Metropolitan Transit Authority, ...
No. CV- 04 4237 (E.D.N.Y. 2004) 29

U.S. v. Essex County,
No. 2:2009cv02772-KSH-MAS (D. N.J. 2009) 29

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS Page(s)

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. § 2000e, *et seq.* .....*passim*

42 U.S.C. § 2000e-2(a)(1) 2

42 U.S.C. 2000e(j) 2

EEOC, Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (2004)..... 29

CONGRESSIONAL RECORD

118 CONG. REC. 705–06 (1972)..... 3, 14

COURT FILINGS

Defendant-Appellant Appeal, EEOC v. Abercrombie & Fitch Stores, Inc., No. 11-5110 (10th Cir. Oct. 1, 2013) 16

NAACP-Legal Defense Fund, Complaint in *Gonzalez v. Abercrombie & Fitch, Stores, Inc.*, 2011 U.S. Dist. LEXIS 67356 (N.D. Cal. 2011), *available at* http://www.naacpldf.org/files/case_issue/Abercrombie_Complaint.pdf..... 25

Brief of Respondent in Opposition for Writ of Cert, EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86 (S. Ct. Aug. 27, 2014)..... 28, 29, 30

TABLE OF AUTHORITIES—Continued

BOOKS

JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH (4th ed. 2011) 18

ABUL A'LA MAWDUDI, TOWARDS UNDERSTANDING ISLAM (American Trust Pub. 1986) 17

OTHER SOURCES

Abercrombie & Fitch Stores, Inc. Online Shop:

Women's Accessories Hats: Embellished Beanie, http://www.abercrombie.com/shop/us/womens-caps-accessories/embellished-beanie-3552604_01 (last visited Dec. 9, 2014) 30

Women's Accessories Hats: Dots Ball Cap, http://www.abercrombie.com/shop/us/womens-caps-accessories/dots-ball-cap-3020593_01 (last visited Dec. 9, 2014).. 30

Men's New Arrivals Accessories: Woolrich Baseball Cap, http://www.abercrombie.com/shop/us/p/woolrich-with-a-and-ampf-buffalo-checked-wool-baseball-cap-3555573 (last visited Dec. 9, 2014) 30

Women's Accessories Scarves: Blanket Scarf, http://www.abercrombie.com/shop/us/womens-fashion-scarves-accessories/duofold-plaid-scarf-3621617_01 (last visited Dec. 9, 2014) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Women's Accessories Scarves: Plaid Scarf—SOLD OUT, http://www.abercrombie.com/shop/us/womens-fashion-scarves-accessories/cozy-plaid-scarf-2722087_01 (last visited Dec. 9, 2014) 31

Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441 (2008)..... 17, 18, 19

ACLU Women's Rights Project Report, *Discrimination Against Muslim Women*, *available at* https://www.aclu.org/sites/default/files/pdfs/womensrights/discriminationagainstmuslimwomen.pdf..... 11, 12

Al-Qur'an
33:59 18

Sadia Aslam, *Hijab in the Workplace: Why Title VII does not adequately protect employees from discrimination on the basis of religious dress and appearance*, 80 UMKC L. REV. 221 (2001) 20

Sahar Aziz, *Coercive Assimilation*, MICH. J. OF RACE & L. (forthcoming Fall 2014) 14

Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191 (2012)..... 20, 21, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Aya Batraway, *Young Muslim Women Want to Fuse Fashion with Faith*, DETROIT FREE PRESS, Oct. 20, 2014 34

Aya Batraway, *Hijabi Hipsters Fuse Fashion with Faith*, THE DAILY TELEGRAPH, Oct. 21, 2014..... 34

Robert Belton, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431 (Spring 2005) 14

Kingsley Brown, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. 287 (1993)..... 13

Anna Challet, *Young Muslims Choosing to Wear the Hijab Despite Rising Tide of Islamo-phobia*, NEW AMERICAN MEDIA, Apr. 21, 2014, http://newamericamedia.org/2014/04/ young-muslims-choosing-to-wear-the-hijab-despite-rising-tide-of-islamophobia.php..... 32-33

Andrea Cooper, *Interview With Rose Hamid: Flight Attendant, Hijab Wearer*, WORLD HUM, Aug. 21, 2009, http://www.worldhum.com/features/travel-interviews/interview-with-rose-hamid-the-life-of-a-muslim-flight-attendant-20090716/..... 10

TABLE OF AUTHORITIES—Continued

Page(s)

Council on American-Islamic Relations, *1997 Civil Rights Report: Unveiling Justice*, *available at* https://www.cair.com/images/pdf/1997-The_Status_of_Muslim_Civil_Rights_in_the_United_States_1997.pdf 9, 10

1998 Civil Rights Report: Patterns of Discrimination, *available at* https://www.cair.com/images/pdf/CAIR-1998-Civil-Rights-Re port.pdf. 9, 10

1999 Civil Rights Report: Expressions of Faith, *available at* http://cair.com/images/pdf/CAIR-1999-Civil-Rights-Report.pdf. 9

2001 Civil Rights Report: Accommodating Diversity, *available at* https://www.cair.com/civil-rights/12-civil-rights/32-2001-civil-rights-report-accommodating-diversity.html 9, 10

2002 Civil Rights Report: Stereotypes and Civil Liberties, *available at* https://www.cair.com/images/pdf/CAIR-2002-Civil-Rights-Report.pdf. 11

2006 Civil Rights Report: The Struggle for Equality, *available at* https://cair.com/ images/pdf/CAIR-2006-Civil-Rights-Report. pdf..... 10, 11

TABLE OF AUTHORITIES—Continued

Page(s)

2007 Civil Rights Report: Presumption of Guilt: The Status of Muslim Civil Rights in the United States, *available at* https://www.cair. com/civil-rights/civil-rights-reports/2007.html 11

2009 Civil Rights Report: Without Fear of Discrimination, *available at* https://www.cair.com/images/pdf/CAIR-2009-Civil-Rights-Report.pdf 11, 12

Islamaphobia and Its Impact in the United States (Jan. 2009-Dec. 2010), *available at* https://www.cair.com/images/islamophobia/2010IslamophobiaReport.pdf 12

CAIR unpublished data (2006), copy on file with the Women's Rights Project 11

EEOC Compliance Manual § 12-1(A)(1)) (7/22/2008) 24

EEOC, Enforcement and Litigation Statistics, http://eeoc.gov/eeoc/statistics/enforcement/religion.cfm 13

EEOC Guidance, Religious Discrimination, http://www.eeoc.gov/laws/types/religion.cfm 19

EEOC Press Release, *EEOC Sues Shadescrest Healthcare for Religious Discrimination and Retaliation*, July 7, 2014, http://eeoc.gov/eeoc/newsroom/release/7-7-14.cfm 13

TABLE OF AUTHORITIES—Continued

Page(s)

EEOC Statistical Data: *Discrimination and Retaliation Charges Filed by Arab and Muslim Americans*, http://www.adc.org/fileadmin/ADC/ADC_EEOC_Stats_Press_Release_2013.pdf 13

Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997) 29

Federal Bureau of Investigation Uniform Crime Reporting Program, "Hate Crimes Statistics, 2001," *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2001/hatecrime01.pdf 22

Jamie Feldman, *Stylish Blogger Reminds Us: 'The Hijab And Fashion Are Not Mutually Exclusive'*, HUFF POST, Jan. 13, 2014 ..... 32, 34

Tim Feran, *Abercrombie & Fitch offers another outside brand—Woolrich*, THE COLUMBUS DISPATCH, Nov. 4, 2014 30

Religious Freedom Has a Place in the Workplace, FIND LAW (Nov. 9, 2010), http://knowledgebase.findlaw.com/kb/2010/Nov/208334.html 23

Gamma Gamma Chi Sorority, Inc., Website, http://gammagammachi.org/splash/ (last visited Dec. 9, 2014) 33

TABLE OF AUTHORITIES—Continued

Page(s)

Amarra Ghani, *Muslim 'Hipsters' Turn A Joke Into A Serious Conversation*, NPR, Dec. 28, 2013, http://www.npr.org/blogs/codeswitch/2013/12/28/250786141/muslim-hipsters-turn-a-joke-into-a-serious-conversation (last visited Dec. 9, 2014)..... 33

Leo C. Goodwin Symposium: *Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice: Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?* 31 NOVA L. REV. 279 (2007) 20, 22

Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, NY TIMES, Sep. 23, 2010 12

Haute Hijab Website, http://www.hautehijab. com/ (last visited Dec. 9, 2014)..... 33

Hollister Co. Online Shop:

Girls Accessories Hats: Beach Hat, http://www.hollisterco.com/shop/us/girls-hats/felt-floppy-hat-2526574 (last visited Dec. 9, 2014)..... 30

Girls Accessories Hats: Classic Winter Beanie, http://www.hollisterco.com/shop/us/girls-hats/classic-winter-beanie-3588571 (last visited Dec. 9, 2014)..... 30

Girls Accessories Scarves: Vintage Plaid Scarf, http://www.hollisterco.com/shop/us/ girls-accessories/vintage-plaid-scarf-2463070 (last visited Dec. 9, 2014)..... 31

TABLE OF AUTHORITIES—Continued

Page(s)

Girls Accessories Scarves: Supersoft Infinity Scarf, http://www.hollisterco.com/shop/us/ girls-accessories/supersoft-infinity-scarf-3577608 (last visited Dec. 9, 2014) 31

Jae C. Hong, *Muslim Woman Sues Disney Over Wearing Hijab at Work*, NBC NEWS, Aug. 13, 2012 12

Human Rights Watch, *"We are Not the Enemy" Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arabs or Muslims after September 11*, Vol. 14 no. G, Nov. 2002, http://www.hrw.org/reports/2002/usahate/usa1102.pdf 22

Homa Khaleeli, *The Hijab Goes High Fashion*, THE GUARDIAN, July 27, 2008 ... 33

Shaimaa Khalil, *Muslim Designers Mix the Hijab with Latest Fashions*, BBC NEWS, May 14, 2010 33

Ellie Krupnik, *Muslim Clothing Gets Chic with 'Hijab Couture'*, HUFF POST, June 6, 2013 34

Mu Sigma Alpha Facebook Webpage, https://www.facebook.com/pages/Mu-Sigma-Alpha-First-Undergraduate-Muslim-Sorority/127457 574030953 33

3 Way to Wear a Graphic Tee if You're Done with Bum Sweats, MUSLIM GIRL, Oct. 13, 2014, http://muslimgirl.net/8210/graphic-tee-3-ways/ (last visited Dec. 9, 2014) 32

TABLE OF AUTHORITIES—Continued

Page(s)

Muslim Americans: No signs of growth in alienation or support for extremism, PEW RESEARCH CENTER, Aug. 30, 2011, http://www.people-press.org/2011/08/30/section-2-religious-beliefs-and-practices/ 19, 24

Pew Research, Religion & Public Life Project: Religious Landscape Survey, Report 1: Religious Affiliation, http://religions.pew forum.org/reports 21

Jamie Darin Prenkert and Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467 (Fall 2006) 3

Princeton Muslim Students Association, *Hijabi Monologues*, http://www.princeton.edu/~msa/events.html (last visited Dec. 9, 2014) 32

Rudolph A. Pyatt Jr., *Penney's Too-Revealing Dress Code*, WASHINGTON POST, Aug. 12, 1996 9

Alyssa E. Rippy & Elana Newman, unpublished raw data, 2008, copy on file with the Women's Rights Project 12

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Turban Outfitters 48, Products Webpage, http://www.turbanoutfitters48.com/products (last visited Dec. 9, 2014)..... 32

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INTEREST OF *AMICUS CURIAE* [1]

The American-Arab Anti-Discrimination Committee ("ADC") is a non-sectarian and non-partisan organization, the country's largest Arab American nonprofit grassroots civil rights organization. ADC seeks to preserve and defend the rights of those whose Constitutional and federal rights are violated in the United States ("U.S."). Founded in 1980 by U.S. Senator James Abourezk, ADC consists of members from all 50 states and has multiple chapters nationwide. ADC has been at the forefront of protecting the Arab-American community for over thirty years against discrimination, racism, and stereotyping, and vigorously advocates for civil rights for all. ADC is joined in this brief by: Muslim Women Lawyers for Human Rights (KARAMAH), Cornell University Islamic Alliance for Justice, and Penn State Muslim Students' Association. *See* Appendix A for a full statement of interest from *amici*.

Amici's interest in this case arises from receipt of an increasing number of complaints and/or cases of employment discrimination based on religion. Title VII makes it unlawful for an employer to discharge

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[1] The parties have consented to the filing of this brief pursuant to Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission of this brief.

any individual or discriminate based on the individual's religion.[2] The law requires employers to provide reasonable accommodations in respect to an employee or prospective employee's religious observance or practice unless the employer can demonstrate that the accommodation would cause undue hardship on its business.[3] Title VII religious accommodation protections are particularly vital where an applicant's or employee's faith is readily identifiable by an article of faith.

The rights of *Amici's* constituents of the Muslim faith will be fundamentally affected by the decision of this Court to reverse or uphold the Tenth Circuit decision. *Amici's* constituents will be effectively excluded from employment and/or terminated by employers based on religion under the guise of branding and/or "look" policy. Particular articles of faith are synonymous with specific religions and readily identifiable upon observation, such as a hijab with Islam. The Tenth Circuit decision that employers "live in a bubble", that employers are not aware that articles of faith may require a religious accommodation. If the Tenth Circuit Court decision is upheld, this Court effectively gives permission for employers to discriminate based on religion.

STATEMENT

The purpose of the *Amicus* is to urge this Court to reverse the Tenth Circuit's holding that an employer can only be held liable under Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" if the employer

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[2] 42 U.S.C. § 2000e-2(a)(1).

[3] 42 U.S.C. § 2000e(j).

has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the application or employee.

First, the *Amicus* argues that the Tenth Circuit's decision undermines Title VII protections. Second, the *Amicus* argues that wearing the hijab is a sincerely held religious practice that is protected by Title VII. Third, the *Amicus* argues that the Respondents "Look Policy" is discriminatory. Lastly, the *Amicus* argues that permitting employees to wear hijab will have less than a *de minimis* cost or burden on the Respondent's commercial look.

ARGUMENT

I. The Tenth Circuit's Decision Undermines Title VII Protections.

Looking to the Congressional record indicates Congress amended Title VII to provide for religious accommodations in response to the grave implications of *Dewey v. Reynolds Metal Co* and *Riley v. Bendix Corp.*[4] Both cases held there was no religious discrimination where the employer's action was based on a uniformly applied, religion-neutral rule or working condition.[5] The reasoning of these cases also extended to where the rule or condition conflicted with the dictates of the employee's religion.[6] Upholding the

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[4] 429 F.2d 324 (6th Cir. 1970); 402 U.S. 689 (1971); *see* 118 CONG. REC. 705–06 (1972).

[5] Jamie Darin Prenkert and Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 474 (Fall 2006).

[6] *Id.*

Tenth Circuit's decision will reinvigorate the misapplication of Title VII in *Dewey* and *Riley*.

A. Distinguishing between constructive knowledge and actual knowledge encourages employers to conceal work conflicts with religion and not engage in the interactive process.

The Tenth Circuit improperly decided constructive knowledge is insufficient under the *McDonnell Douglas* framework.[7] There is no substantive difference between actual knowledge and constructive knowledge because "an employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'"[8] Both the District Court and Respondent acknowledged that the interviewer believed Ms. Elauf wore the hijab for religious reasons.[9] The Respondent "assumed she was Muslim" and "figured that was the religious reason why she wore her head scarf."[10] In spite of this, the Tenth Circuit reasoned that since the words did not

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[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 1130–31 (1973).

[8] *See e.g.*, *Brown v. Polk County*, 61 F. 3d 650, 654 (8th Cir. 1995); *see e.g.*, *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *see e.g.*, *EEOC v. White Lodging Servs. Corp.*, 2010 U.S. Dist. LEXIS 32492, at *16 (W.D. Ky. 2010).

[9] EEOC, 731 F.3d at 1115, 1148.

[10] *Id.* at 1114; *see also* EEOC, 798 F. Supp.2d at 1278. There is also testimony that the interviewer informed the Respondent's District Manager that Ms. Elauf wore the scarf for religious reasons. *Id.*

come out of Ms. Elauf's mouth, Title VII's religious accommodation protections did not apply.[11]

The Respondent acknowledges that it did not hire Ms. Elauf because she would need an accommodation and/or exception to their "no hat policy", but then states they did not know she needed an accommodation.[12] The Respondent should not be allowed to act upon the basis of a perceived need for an accommodation but at the same time argue that it did not know it was required to provide her an accommodation. The Respondent did not believe Ms. Elauf wore the hijab for a fashion reason, because then the Respondent would have asked Ms. Elauf to remove the headscarf or inform her that she could not wear the headscarf to work. But the Respondent did not do this. The Respondent acted on its belief that Ms. Elauf wore the hijab for religious reasons and would be inflexible about it by not hiring Ms. Elauf.

If the Respondent had engaged in dialogue with Ms. Elauf regarding whether she wore the hijab for religious reasons based on this same constructive knowledge and subsequently did not hire her that would violate Title VII. If acting upon constructive knowledge is sufficient under the work-religion dialogue element of the *McDonnell Douglas* framework, [13] constructive knowledge is also sufficient under the notice component of the framework. The Tenth Circuit's rationale to distinguish constructive knowledge from actual knowledge is absurd and

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[11] *See* EEOC, 731 F.3d at 1114–15, 1128–30.

[12] *See id.*

[13] *See McDonnell Douglas Corp.*, 411 U.S. at 800–05.

makes a mockery of Title VII because the Respondent had "enough information."

The *McDonnell Douglas* framework for accommodations is flexible, not rigid.[14] Federal courts have provided exceptions or modified the framework when an employer's obligation to consider a reasonable accommodation is triggered.[15] As the Tenth Circuit noted, accommodations under the Americans with Disabilities Act (ADA) are often looked to for guidance in religious accommodation cases.[16] However, the Tenth Circuit failed to consider in its 'notice' analysis that federal courts have determined in ADA cases that there is no requirement that an employer have actual knowledge in order to engage in the interactive process.[17] In *Barnett v. U.S. Air, Inc.*, the Ninth Circuit found that the employer violated the ADA although the employee did not request an accommodation.[18] The Ninth Circuit made sure to highlight that "[t]he interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation.[19] The Ninth Circuit in *Coley v. Grant County* reiterated that an employer in some cases has

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[14] *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *see Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978).

[15] *See e.g., Stover v. Martinez*, 382 F.3d 1064, 1077 (10th Cir. 2004).

[16] EEOC, 731 F.3d at 1123, 1141.

[17] *See e.g., Barnett v. U.S. Air, Inc.*, 200 F. Supp. 2d 151, 169 (E.D.N.Y. 2002).

[18] 228 F.3d 1105, 1112 (9th Cir. 2000), *vacated on other grounds, US Airways, Inc. v. Barnett*, 535 U.S. 391, 152 L. Ed. 2d 589, 122 S. Ct. 1516 (2002).

[19] *Id.* at 1112–13.

an obligation to engage in the interactive process without a request from the employee where the employee's job performance was attributable to his disability.[20] In *Jacques v. DiMarzio*, the Second Circuit also reasoned that employers have an obligation to engage in an interactive process with a person who *may* need a disability accommodation, although no formal request by the employee is made.[21] The Seventh Circuit has also acknowledged that where notice is ambiguous, but sufficient to notify the employer that the employee *may* have a disability that requires accommodation, the employer must ask for clarification.[22]

This Court should hold that based on the particular facts of a case, an employer is required to engage in an interactive process upon recognizing that an employee or applicant *may* need a religious accommodation. Such a holding would not place an additional burden on the Respondent. There are no additional responsibilities placed on the Respondent based on whether it has "actual" knowledge versus "constructive" knowledge. The Respondent is merely asked to inquire into whether the applicant or employee wears the headscarf for a religious reason. Without this, inevitably, employers will actively conceal work-religion conflicts and refrain from engaging in dialogue, striking at the heart of Title VII.

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[20] *See Coley v. Grant County*, 36 Fed. Appx. 242, 244 (9th Cir. 2002).

[21] 386 F.3d 192 (2d Cir. 2004).

[22] *See EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 804 (7th Cir. 2005); *see Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1285 (1996).

The obligation to engage in an interactive process is to address both the needs of the employee's religion and the employer's business.[23] However, under the Tenth Circuit's decision, employers who conceal a work-religion conflict will effectively have a choice not an obligation, to engage in the work-religion dialogue under Title VII. As articulated above, the Tenth Circuit's decision would allow Title VII not to apply to an employer who acts on constructive knowledge but does not engage in the interactive process. This will gut the purpose and intent of Title VII religious accommodation protections. As Judge Ebel gravely warned in his dissent, "[Abercrombie] was able to affirmatively avoid its obligation to engage in an interactive dialogue with Elauf about a reasonable accommodation of Elauf religious practice by not mentioning the possible conflict and then not hiring her because of it."[24]

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[23] *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

[24] EEOC, 731 F.3d at 1143–44 (Ebel, J., dissent) ("Abercrombie refused to hire Elauf, without ever informing her that wearing a hijab conflicted with Abercrombie's Look Policy, in order to avoid having to discuss the possibility of reasonably accommodating Elauf's religious practice. If true, that would be religious discrimination proscribed by Title VII"); *see also Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F. 3d 1242, 1253 (10th Cir. 2004) ("neither party may create or destroy liability by causing a breakdown of the interactive process") (disability accommodation case). The Seventh Circuit in *EEOC v. Sears, Roebuck & Co.*, similarly held that employers cannot shield themselves from liability by "intentionally remaining in the dark. 417 F.3d 789, 804 (7th Cir. 2005).

B. Pervasive employment discrimination in the Muslim community.

The Tenth Circuit's decision will permit pervasive employment discrimination against the Muslim community and reward employers who circumvent the law. Based on the drastic growth of discrimination against Muslims before and after 2001, and continuing trends, the pervasive discrimination is hardly speculative.

Discrimination against Muslim hijabi women is widespread and has been documented over the past twenty years as discussed below. Between 1996 and 2000, the majority of employment discrimination complaints received by the Council of American-Islamic Relations were filed by Muslim hijabi women.[25] In 1996, J.C. Penny engaged in adverse employment action against a Muslim woman who wore a hijab, citing violation of the dress code.[26] In 1997, Office Depot suspended a Muslim woman for

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[25] CAIR, *2001 Civil Rights Report: Accommodating Diversity*, at 5, 9–24, *available at* https://www.cair.com/civil-rights/12-civil-rights/32-2001-civil-rights-report-accommodating-diversity. html.

[26] Rudolph A. Pyatt Jr., *Penney's Too-Revealing Dress Code*, WASHINGTON POST , Aug. 12, 1996; CAIR, *1997 Civil Rights Report: Unveiling Justice*, at 13, *available at* https://www.cair.com/images/pdf/1997-The_Status_of_Muslim_Civil_Rights_in_the_United_States_1997.pdf [hereinafter *CAIR 1997 Report*]. Complaints have also been filed regarding dress code violations by wearing a hijab against Office Max and hospitals, and other clothing stores including Nordstrom, Bradlees, and KMART. *Id.* at 13, 15–16; CAIR 1998 Report, at 31, 33, 35; *see also* CAIR, *1999 Civil Rights Report: Expressions of Faith*, at 4, 11–14 (detailing repeat offenders by employers with image and brand driven or uniform policy including waitresses, McDonalds, and Dunkin Donuts).

wearing a hijab, citing violation of dress code.[27] U.S. Airways removed a Muslim woman who wore a hijab from her position as flight attendant in 1995[28] and placed another Muslim woman who wore a hijab on leave upon instituting a new "image policy."[29] The 1997 CAIR Report details several incidents where a hotel employer, namely the Marriott, informed their employee that they could not grant her an accommodation for the hijab because it was not part of the uniform.[30] In 1998, CAIR found that the hijab was the top identifying factor, related to 31% of employment-related incidents reported.[31] In 2000, 28% incidents reported to CAIR were hijab and/or khimar related.[32]

Post 2001, hijabs remained a high identifying factor for employment discrimination.[33] Between 2000 and

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[27] Heather Salerno, *Workplaces Taking Leaps of Faith*, WASHINGTON POST, May 18, 1997.

[28] Andrea Cooper, *Interview With Rose Hamid: Flight Attendant, Hijab Wearer*, WORLD HUM, Aug. 21, 2009, http://www.worldhum.com/features/travel-interviews/interview-with-rose-hamid-the-life-of-a-muslim-flight-attendant-20090716/.

[29] CAIR, *1998 Civil Rights Report: Patterns of Discrimination*, at 19.

[30] *Id.*; CAIR 1997 Report, at 11, 15–16, 19; *see also* CAIR 1998 Report, at 35 (involving Sheraton Hotel).

[31] CAIR, *1998 Civil Rights Report: Patterns of Discrimination*, at 11, *available at* https://www.cair.com/images/pdf/CAIR-1998-Civil-Rights-Report.pdf. An additional 2% of incidents were identified as scarf and niqab related.

[32] CAIR, *2001 Civil Rights Report: Accommodating Diversity*, at 5, 9–24, *available at* https://www.cair.com/civil-rights/12-civil-rights/32-2001-civil-rights-report-accommodating-diversity.html.

[33] *See* CAIR, *2006 Civil Rights Report: The Struggle for Equality*, at 17–18, *available at* https://cair.com/images/pdf/CAIR-2006-Civil-Rights-Report.pdf [hereinafter *CAIR 2006*

2006, complaints filed with CAIR drastically increased by 674% to 2,467 employment-related complaints by Muslims.[34] In 2002, a diner informed their employee that the hijab violated the company's handbook.[35] Upon finding that the company handbook did not have any headwear policy, the company added a no headwear policy and fired the Muslim women.[36] In 2002, image and brand driven companies such as Sears and Subway took adverse employment action against Muslim women who wore a hijab.[37] In 2005, Dunkin Donuts told a Muslim woman not to report to work wearing her hijab.[38] A 2006 assessment conducted by the American Civil Liberties Union revealed that the hijab or headscarf were the main motivating factor that triggered discrimination against Muslim women.[39] According to 2008 data, 69% of Muslim women who wore hijab reported at least one incident of discrimination compared to 29% of women who did

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Report]; *see also* CAIR, *2009 Civil Rights Report: Without Fear of Discrimination*, at 15–16, *available at* https://www.cair.com/images/pdf/CAIR-2009-Civil-Rights-Report.pdf [hereinafter *CAIR 2009 Report*].

[34] CAIR, *2007 Civil Rights Report: Presumption of Guilt: The Status of Muslim Civil Rights in the United States*, at 8, *available at* https://www.cair.com/civil-rights/civil-rights-reports/2007.html

[35] *Id.* at 46.

[36] *Id.*

[37] CAIR, *2002 Civil Rights Report: Stereotypes and Civil Liberties*, at 44–45, *available at* https://www.cair.com/images/pdf/CAIR-2002-Civil-Rights-Report.pdf.

[38] CAIR 2006 Report *supra* note 31, at 22.

[39] *See* ACLU Women's Rights Project, Report on Discrimination Against Muslim Women, *referring to* CAIR, unpublished data, 2006, copy on file with the Women's Rights Project, *available at* https://www.aclu.org/sites/default/files/pdfs/womensrights/discriminationagainstmuslimwomen.pdf.

not wear hijab.[40] In 2008, a janitorial services contractor informed employees, including Muslim women who wore hijabs, that non-compliance with the mandatory dress code, pants and a tucked in shirt, would be fired, transferred, or subjected to a pay cut.[41]

"Although Muslims make up less than 2 percent of the United States population, they accounted for about one-quarter of the 3,386 religious discrimination claims filed with the E.E.O.C. [in 2009]."[42] In 2009, the Washington Metro Transportation Authority prohibited two Muslim employees from wearing their hijab.[43] In 2010, image and brand driven companies such as McDonalds and Disney continued to take adverse employment action against Muslim women who wear a hijab citing conflict with "look policy".[44] Muslim women who wear a hijab and/or head scarf are more likely to be subjected to discrimination than those who do not.[45]

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[40] *Id.*

[41] CAIR 2009 Report, at 18.

[42] Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, NY TIMES, Sep. 23, 2010.

[43] *See* Kytja Weir, *Metro Secretary Sues Agency over Religious Discrimination*, WASHINGTON EXAMINER, June 5, 2012. Mary Jo O'Neill, regional attorney for the Phoenix district office of the EEOC states, "There is a hatred, an open hatred, and a lack of tolerance for people who are Muslim." Eve Tahmincioglu, *Muslims Face Growing Bias in the Workplace*, Sept. 13, 2010.

[44] CAIR, *Islamaphobia and Its Impact in the United States* (Jan. 2009—Dec. 2010), at 32, *available at* https://www.cair.com/images/islamophobia/2010IslamophobiaReport.pdf; Jae C. Hong, *Muslim Woman Sues Disney Over Wearing Hijab at Work*, NBC NEWS, Aug. 13, 2012.

[45] *See* Alyssa E. Rippy & Elana Newman, unpublished raw data, 2008, copy on file with the Women's Rights Project.

Current reports demonstrate that employment discrimination against Muslim hijabi women will continue to rise. The Equal Employment Opportunity Commission ("EEOC") reports that Muslims have filed more charges of religious discrimination and failure to provide religious accommodations than any other religious group.[46] In 2012, over 20% of the 3,836 EEOC religious discrimination claims were filed by Muslims.[47] In June 2014, the EEOC filed a lawsuit against Shadescrest Nursing Home which ordered a certified nursing assistant to either remove her hijab or be subject to termination.[48] In consideration of the above, coupled with employers actively concealing work-religion conflict incidents, religious discrimination by employers will pervasively perpetuate if the Tenth Circuit decision is upheld.

The Court should also be cognizant of the evolution of employment discrimination from blatant to concealed discrimination.[49] The purpose of Title VII was

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[46] EEOC Statistical Data: Discrimination and Retaliation Charges Filed by Arab and Muslim Americans, http://www.adc.org/fileadmin/ADC/ADC_EEOC_Stats_Press_Release_2013.pdf.

[47] *Id.*; *see also* EEOC, Enforcement and Litigation Statistics, http://eeoc.gov/eeoc/statistics/enforcement/religion.cfm.

[48] Press Release, *EEOC Sues Shadescrest Healthcare for Religious Discrimination and Retaliation*, July 7, 2014, http://eeoc.gov/eeoc/newsroom/release/7-7-14.cfm.

[49] *See* Kingsley Brown, The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?, 43 CASE W. RES. 287, 292 n.4 (1993) ("[W]hat the Court has said to employers in *Wards Cove* is that while you still can't commit blatant, obvious acts of discrimination against minorities and women, if you are sophisticated and discreet about it, we will look the other way. You cannot hang a "no blacks allowed" sign on your door, but if you're clever and come up with

to eliminate subtler forms of discrimination, not just obvious, blatant discrimination.[50] In theory, Title VII under the *McDonnell Douglas* framework, namely the dialogue component, protects all persons from discrimination in employment based on religion. When discrimination is blatant, there is no question that Title VII will be invoked. But if the Tenth Circuit's decision is upheld, there is doubt whether Title VII will protect persons in employment from subtler forms of discrimination, like that suffered by Ms. Elauf. The Court should give due consideration to the severe ramifications of the Tenth Circuit's decision on Muslim and other religious communities.

II. Wearing the Hijab is a Religious Practice Protected by Title VII.

The Tenth Circuit Court improperly questioned the motivation that Muslim women have for wearing the hijab, implying that the motivation for some women is cultural rather than religious.[51] It is not the Court's role to distinguish the nuances of religion and culture in attempt to determine whether "religious beliefs are

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a standardized test or some other superficially neutral ruse that achieves exactly the same result, no one will stand in your way"); *see also* Robert Belton, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 438–39 (Spring 2005); *see generally* Sahar Aziz, *Coercive Assimilation*, MICH. J. OF RACE & L. (*forthcoming* Fall 2014).

[50] *See* 118 CONG. REC. 705–06 (1972) (statements of Senator Randolph).

[51] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1112 (10th Cir. 2013) (*citing* the EEOC's expert witness, Dr. John L. Esposito).

mistaken or insubstantial."[52] Further, wearing the hijab is a recognized and easily identifiable religious practice of Islam.

A. Religious beliefs are a personal matter.

While membership in a religious sect helps to simplify the matter of identifying sincerely held beliefs,[53] "the guarantee of free exercise is not limited to the beliefs which are shared by all the members of a religious sect."[54] The Court should refrain from any decision that would implicate what is a flexible or inflexible religious practice because it is not the Court's job to determine the verity of religious beliefs.[55] Therefore, the court should only judge whether the Ms. Elauf's religious belief was "sincerely

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[52] *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, 2014 U.S. at *37–38.

[53] *See Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829 (1989).

[54] *Eddie Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715–16 (1981).

[55] *Hobby Lobby Stores, Inc.*, *supra* note 52, at *37–38; *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (holding that "it is not within the judicial function and judicial competence to inquire whether the petitioner or [another member of his faith] more correctly perceived the commands of their common faith," because "courts are not arbiters of scriptural interpretation"); *see Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003) (Sotomayor, J., Opinion) ("[F]ree exercise claims often test the boundaries of the judiciary's competence, as courts are "singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs", *quoting Patrick v. Lefevre*, 745 F.2d 153, 157 (2d Cir. 1984)).

held"[56] or "bona fide,"[57] as the District court did in finding that Ms. Elauf wore her "headscarf based on her belief that the Quran requires her to do so."[58]

This Court recently addressed and affirmed the personal nature of religious beliefs and practices in *Hobby Lobby*, which concerned the religious beliefs of Christian persons (corporations).[59] This Court stated that "it is not for us to say that their religious beliefs are mistaken or insubstantial . . . [i]nstead, our narrow function in this context is to determine" [whether the line drawn reflects] an honest conviction."[60] In

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[56] Frazee, *supra* note 53, at 833; *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1011 (D. Ariz. 2006) ("It is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course to the verity—of someone's religious beliefs in . . . the Title VII context", *quoting Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985)).

[57] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (The modified McDonnell-Douglas framework for religious accommodations provides that employee must prove: (1) a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was fired [or not hired] for failure to comply with the conflicting employment requirement. *See Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000); *see Dixon v. Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2010); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973).

[58] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1114 (10th Cir. 2013) (citing the district court's finding that Ms. Elauf wore her "headscarf based on her belief that the Quran requires her to do so"); *see*, Defendant-Appellant Appeal, EEOC v. Abercrombie & Fitch Stores, Inc., No. 11-5110 (10th Cir. Oct. 1, 2013); *see also EEOC v. White Lodging Services Corp.*, 2010 U.S. Dist. LEXIS 32492, 3 (W.D. Ky. Mar. 31, 2010) (Noting that each women wore a hijab "in accordance with Muslim practice.")

[59] *Hobby Lobby Stores, Inc.*, *supra* note 52, at 37–38.

[60] *Id.*

contrast with the Tenth Circuit's Opinion in this Case, which posited that wearing the hijab could be influenced more by culture than religion, this Court granted great deference to the individual's religious practice in *Hobby Lobby*.[61] This Court did not determine whether the practices are a result of culture rather than religion, which can be very difficult to differentiate.[62] Indeed, religious and cultural practices are so heavily intertwined that decision about which practices are sincerely religious and which are merely cultural are risk reflecting nothing more than the norms of the dominant culture or majority religion.[63]

B. Wearing the hijab is a religious practice of Islam.

Muslims believe that Islam is the complete way of life which allows one to achieve inner peace with the universe.[64] The word Islam is derived from the Arabic world "salam," which means peace.[65] The word Islam

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[61] *Id.* at 14.

[62] Frazee, *supra* note 53, at 833 ("Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining wither a professed belief is sincerely held").

[63] *See Goldman v. Weinberger*, 475 U.S. 503, 521 (1986) (Brennan, J., dissenting) (noting that "under the guise of neutrality and evenhandedness, majority religions are favored over minority faiths").

[64] Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 448 (2008); ABUL A'LA MAWDUDI, TOWARDS UNDERSTANDING ISLAM 1-2 (American Trust Publications 1986).

[65] *Id.*

itself means "submission, surrender, and obedience."[66] Therefore, many Muslims believe that they must follow certain religious practices in order to surrender their lives to God and achieve inner peace.[67]

Wearing the hijab is a religious practice of Muslim women. The Tenth Circuit observed that a hijab is the "veil or head covering worn by Muslim women in public."[68] Hijab comes from the word 'hajaba', which means "to prevent from seeing."[69] Hijab refers to broad notions of modesty, privacy, and morality.[70]

The Qur'anic text itself refers to a practice of wearing a certain type of head covering in order to effectuate the principles of modesty, privacy, and morality. A verse of the Quran says, "O Prophet, tell your wives and daughters and the women of the believers to draw their cloaks close round them."[71] Further, the Islamic Hadith or "prophetic tradition" explains how women can fulfill the requirements of the hijab by covering their bodies with the exception of the hands, face, and feet upon the age of puberty.[72]

In addition to Islam, the religious practice of wearing a head covering to effectuate modesty and spirituality is utilized in a variety of religions, and recognized by the EEOC as a protected religious

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[66] *Id.*

[67] *Id.*

[68] JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 310 (4th ed. 2011).

[69] Abdo *supra* note 65, at 448.

[70] *Id.*

[71] Al-Qur'an 33:59.

[72] Abdo, *supra* note 65, at 448.

practice.[73] The EEOC provides that employers must accommodate an employee's religious beliefs or practices, including things such as dress or grooming.[74] These protected religious practice include "wearing particular head coverings or other religious dress (such as a Jewish yarmulke or a Muslim headscarf), or wearing certain hairstyles or facial hair (such as Rastafarian dreadlocks or Sikh uncut hair and beard)."[75]

A majority of American Muslim women regularly wear a hijab. According to a 2011 survey by Pew Research Center, about 6 out of 10 Muslim women in America wear the hijab veil at least some of the time, including 36% who say they wear it whenever they are in public.[76] Muslim hijabi women wear the hijab because of a sincerely held religious belief that a hijab is required by Islam.

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[73] *Id.* (noting that Catholic nuns, Morman, Sikh and Orthodox Jewish women also wear veils or head coverings as part of their religious practice. Orthodox Jewish men wear head coverings, yarmulke, as a religious practice).

[74] EEOC Guidance, http://www.eeoc.gov/laws/types/religion.cfm.

[75] *Id.*; *see EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006).

[76] *Muslim Americans: No signs of growth in alienation or support for extremism*, PEW RESEARCH CENTER, Aug. 30, 2011, http://www.people-press.org/2011/08/30/section-2-religious-beliefs-and-practices/.

i. The hijab is an easily identifiable religious article of Islam, especially in the United States.

The hijab is an Islamic article of faith.[77] A Muslim women's belief the she should wear the hijab is easily identifiable.[78] The hijab makes a Muslim woman's religious beliefs visible, in plain sight and cannot be hidden, just as a Jewish person's religious practice of wearing the Yarmulke is readily apparent by the fact that the person wears the Yarmulke. In America, the hijabi Muslim cannot pass as a non-Muslim, because "there is no acceptable way of wearing a headscarf that circumvents stereotypes."[79] The hijab not only identifies a woman as a Muslim, but identifies her religious practice of wearing the hijab.

While non-Muslims might wear the hijab in other countries for cultural reasons and in part to assimilate into the predominant Muslim and/or local culture, there is no such incentive in the United States. Here, there is actually a strong incentive for non-Muslims to not wear a hijab. There is apparent cultural pressure for Muslims to not wear the hijab in order to fit in and

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[77] Sadia Aslam, *Hijab in the Workplace: Why Title VII does not adequately protect employees from discrimination on the basis of religious dress and appearance*, 80 UMKC L. REV. 221 (2011).

[78] *Leo C. Goodwin Symposium: Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice: Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?* 31 NOVA L. REV. 279, 306 (2007). ("Muslim women are more readily identifiable, as adherents of Islam, when they choose to wear traditional religious attire, such as the headscarf or hijab").

[79] *See* Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 229 (2012).

assimilate with 99.7% of American society who do not wear the hijab.[80] The Respondent's "Look Policy" risks further ostracizing Muslim hijabi women.

ii. Women wear the hijab for religious reasons because wearing the hijab will subject women to heightened risk of persecution.

In the United States, non-Muslim women will avoid wearing a hijab, because wearing it would unnecessarily subject them to the persecution that Muslim women face in post 9/11 America.[81] As the United States Court of Appeals for the Fourth Circuit observed in *EEOC v. Sunbelt Rentals*, "[i]n the wake of September 11th, some Muslim Americans, completely innocent of any wrongdoing, became targets of gross misapprehensions and overbroad assumptions about their religious beliefs."[82] Particularly after the September 11th attacks, Muslim women—readily identifiable by their hijabs—suffered hate crimes and discrimination.[83]

In 2001, the FBI reported that hate crimes against Muslims and people of Middle Eastern ethnicity increased by more than 1600 % from the previous

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[80] *See* Pew Research, Report 1: Religious Affiliation, http://religions.pewforum.org/reports.

[81] *See* Rachel Saloom, *I Know You Are, But What Am I? Arab-American Experiences Through the Critical Race Theory Lens*, 27 HAMLINE J. PUB. L. & POLY 55, 67 (2005).

[82] *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 321, (4th Cir. 2008).

[83] *See* Aziz, *supra* note 79, at 192. The September 11th terrorist attacks transformed the meaning of the Muslim headscarf. *Id.*

year.[84] Anti-Islamic incidents went from being the second least reported in 2000, to the second highest reported type of hate crimes in 2001.[85] In 2002, Human Rights Watch released a report entitled "WE ARE NOT THE ENEMY" Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11.[86] Human Rights Watch reported that persons who are easily identifiable as "Muslim" are more likely to be targeted for hate crimes.[87] HRW reported that "hate crimes included murder, beatings, shootings, vehicular assaults and verbal threats." Further, ADC reported over six hundred September 11 related hate crimes against those perceived to be Arabs or Muslims.[88]

Many American Muslims who wear the hijab are persecuted due to anti-Arab and anti-Muslim stereotypes.[89] The EEOC reported that "complaints

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[84] Federal Bureau of Investigation Uniform Crime Reporting Program, "Hate Crimes Statistics, 2001", *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2001/hatecrime01.pdf.

[85] *Id.*

[86] Human Rights Watch, *"We are Not the Enemy" Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arabs or Muslims after September 11*, Vol. 14 no. G, at 15 Nov. 2002, http://www.hrw.org/reports/2002/usahate/usa1102.pdf.

[87] *Id.*

[88] *Id.*

[89] Goodwin, *supra* note 79, at ("Muslim women are more readily identifiable, as adherents of Islam, when they choose to wear traditional religious attire, such as the headscarf or hijab. Hence, post-9/11, throughout the United States, there have been dramatic increases in reported incidents of discrimination and harassment, not only against Muslims in general, but also against Muslim women in particular").

from Muslims have almost tripled in the years since the events of September 11, 2001."[90] The number of complaints of unlawful discrimination against Muslim employees more than doubled from 697 in 2004 to 1,490 in 2009, 425 of which were filed by Muslim women.[91] Some companies changed their policies after 9/11 in order to discriminate against Muslim women who wear headscarves.[92]

As noted by Professor Sahar Aziz,[93] an "[p]ost-9/11, the Muslim headscarf symbolizes more than a mere cloth worn by a religious minority seeking religious accommodation, it is a visible 'marker' of her membership in a suspect group."[94] Therefore, a woman is highly discouraged from wearing a hijab unless her belief that it is required is sincerely held. According to a Pew Research Survey, nearly seven in ten U.S. Muslims (69%) say that religion is "very important" in

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[90] *See Religious Freedom Has a Place in the Workplace*, FIND LAW, Nov. 9, 2010, http://knowledgebase.findlaw.com/kb/2010/Nov/208334.html.

[91] Aziz *supra* note at 79, at 242.

[92] *Mohamed-Sheik v. Golden Foods/Golden Brands*, No. Civ. A. 303 (W.D. Ky. 2006).

[93] Associate Professor of Law at Texas A&M University School of Law, teaching national security and civil rights law. Professor Aziz has a strong legal background litigating class action civil rights lawsuits and serving as a senior policy advisor for the Office for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security, where she worked on law and policy at the intersection of national security and civil rights .Professor Aziz is a well-recognized published author with her scholarship focusing on the intersection of national security and civil rights law with a focus on the post-9/11 era.

[94] Aziz, *supra* note 79, at 196.

their lives.[95] As the Tenth Circuit noted, "[r]eligion typically concerns ultimate ideas about life, purpose, and death."[96] Given the danger that hate crimes against Muslims' identified by their hijabs, Muslim women would not knowingly subject themselves to discrimination if they believed the hijab was optional, not required. Thus, because wearing the hijab can be dangerous, an American Muslim woman must sincerely believe wearing it is required by Islam in order to justify this otherwise unwarranted risk.

III. Respondent's "Look Policy" is Discriminatory.

The Respondent misuses the appearance standards of its "Look Policy" as a pretext to discriminate. The "Look Policy" goes beyond a brand or image, and attempts to promote a culture that is exclusive of certain groups of people not usually associated with the "look."[97] This was demonstrated in *Gonzalez v. Abercrombie & Fitch Co.*[98] *Gonzalez* stems from a

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[95] *Muslim Americans: No sign of growth in alienation or support for extremism*, PEW RESEARCH CENTER, Aug. 30, 2011, http://www.people-press.org/2011/08/30/section-2-religious-beliefs-and-practices/.

[96] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1117 (10th Cir. 2013) (*citing* EEOC Compliance Manual Section 12-1(A)(1)).

[97] *See* Jenny Strasburg, *Abercrombie & Glitch/ Asian Americans Rip Retailer for Stereotypes on T-Shirts*, SFGATE, April 18, 2002 (discussing Abercrombie selling clothing with discriminatory phrases against Asian Americans, namely a shirt that read "Wong Brothers Laundry Service—Two Wongs Can Make It White" featuring caricatured faces with slanted eyes and rice-paddy hats).

[98] 2011 U.S. Dist. LEXIS 67356, at *7 (N.D. Cal. 2011) (addressing A&F selection criteria having a disparate impact on

lawsuit filed by the NAACP-Legal Defense Fund ("LDF") against the Respondent's discriminatory hiring practices against African-Americans and Latinos.[99] The LDF's 2003 complaint alleged that

> [t]o the extent that it hires minorities, it channels them to stock room and overnight shift positions and away from visible sales positions, keeping them out of the public eye Abercrombie implements its discriminatory employment policies and practices in part through a detailed and rigorous "Appearance Policy" [t]he "A&F Look" is a virtually all-white image that Abercrombie uses not only to market its clothing, but also to implement its discriminatory employment policies or practices.[100]

In the 2011 consent decree enforcement action of *Gonzalez*, the Special Master held that the Respondent's selection criteria for hiring to the "Model" position has an adverse impact on the Respondent's selection of African Americans, African American women, and Latinos.[101] Further, the Respondent did not demonstrate it used 'Best Efforts' to determine whether alternative use of the current selection criteria or an entire separate selection criterion would have a less adverse impact on hiring

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African Americans and Latinos being hired for the "Model" position).

[99] NAACP-Legal Defense Fund, Complaint *Gonzalez v. Abercrombie & Fitch*, *available at* http://www.naacpldf.org/files/case_issue/Abercrombie_Complaint.pdf.

[100] *Id.* at ¶ 3–4.

[101] 2011 U.S. Dist. LEXIS 67356, at *7.

minorities.[102] There were also indications that the Respondent's "Look Policy caused the Respondent to be unable to meet the hiring benchmarks for minorities, as provided in the consent decree."[103]

Additionally, the Respondent's position that their "Look Policy" is necessary to its branding is a crutch. The Respondent has engaged in adverse employment action against Muslim hijabi women, even in positions that do not have a direct brand and/or image duty. The Respondent terminated Umme-Hani Khan, a Hollister "Impact" employee and refused to hire Halla Banafa as a part-time Abercrombie "Impact" associate because they wore hijabs.[104] Respondent acknowledged that it took these adverse employment actions even though an "Impact" employee' primary duties are performed in the stockroom, not on the floor.[105] The Respondent acknowledged that "Impact" employees' primary function is not to model the Abercrombie style.[106] Further, the Respondent's District Manager stated in his testimony at the District Court, "there [is] no difference between a yarmulke, a head scarf, or a ball cap or a helmet for all that matters. It's still a cap, and if an applicant asked to wear a ball cap for religious reasons, [I] still would have denied them."[107]

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[102] *Id.*

[103] *See id.*

[104] *EEOC v. Abercrombie & Fitch Stores, Inc* ., 966 F. Supp. 2d 949, 955 (N.D. Cal. 2013); *EEOC v. Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids*, No. 10-cv-03911-EJD, 2013 U.S. Dist. LEXIS 51905 (N.D. Cal. 2013).

[105] *See* EEOC, 966 F. Supp. 2d at 955.

[106] *See* EEOC, 2013 U.S. Dist. LEXIS 51905, at *5.

[107] EEOC, 798 F. Supp. 2d at 1278.

The Respondent does not hire Muslim women who wear a hijab because they do not like the way they look. Applicants or employees must suppress or change their identity and religious beliefs to work for Respondent. This policy should not be legal. The Court should not uphold a discriminatory branding and imaging strategy that effectively excludes Muslims.

IV. Permitting Employees to Wear the Hijab Will Have Less Than a *de minimis* Cost or Burden on the Respondent's Business.

Federal courts have recognized that an employer must provide a religious accommodation where there is no undue hardship on the employer's business, *i.e.*, no more than a *de minimis* cost or burden.[108] Federal courts have held there was more than a *de minimis* cost or burden where there was a significant cost or more than just an inconvenience.[109] There must be an actual cost or burden, not speculative or hypothetical.[110] The Respondent's position is that they cannot provide a reasonable accommodation allowing Ms. Elauf and other employees to wear a hijab without undue hardship.[111] However, there is no significant cost to the Respondent by permitting an employee to wear a hijab. Permitting employees to wear a hijab

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[108] *Lee v. ABF Freight Sys.* 22 F.3d 1019, 1022 (10th Cir. 1994); *Anderson v. General Dynamics Convair Aerospace Division,* 589 F.2d 397, 402 (9th Cir. 1978).

[109] *Toledo v. Nobel-Sysco, Inc.* 892 F. 2d 1481, 1492 (10th Cir. 1989); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981).

[110] Tooley, *supra* note 109, at 1243; Toledo, *supra* note 109, at 1492.

[111] *EEOC v. Abercrombie & Fitch Stores, Inc.* 731 F.3d at 1114.

will have less than a *de minimis* effect on their business.

The Respondent improperly asserts that permitting employees to wear a hijab will conflict with or is inconsistent with their "Classic East Coast collegiate style of clothing."[112] The Respondent maintains that it puts a great deal of effort in to "ensur[ing] its customers receive a consistent brand-based, sensory experience in its stores."[113] The Respondent further asserts that its "Look Policy" is critical to its preppy and casual brand, and that deviation will negatively impact their business through customer experience.[114]

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[112] *Id.* at 1111.

[113] *See* Brief of Respondent in Opposition for Writ of Cert, EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86 at 2 (S. Ct. Aug. 27, 2014).

[114] EEOC, 731 F. 3d at 1111. Federal courts have rejected a similar contention that customers would not be receptive to an employee wearing a hijab and/or head-covering. *See EEOC v. Alamo Rent-a-Car* Center, 432 F. Supp. 2d 1006, 1014–15 (D. Ariz. 2006). There are broad implications of this case on headwear policies throughout the employment sector. *See e.g.*, *Lewis v. New York City Transit Auth.*, 2014 U.S. Dist. LEXIS 46471, at *4–9, 58–60 (E.D.N.Y. 2014) (involved a Muslim women who wore a khimar the same color of the transit authority uniform with the Transit authority logo on her shirt rather than on her head as a bus driver. Subsequently, was transferred out of passenger service based on noncompliance with headwear policy, failure to remove or cover khimar. The court found no undue hardship and held no "deleterious effects on the Transit Authority's public image"); *see e.g. EEOC v. White Lodging Servs. Corp.*, 2010 U.S. Dist. LEXIS 32492, at *3–4 (W.D. Ky. 2010) (involving Marriot not hiring Muslim women who wore an hijab due to a conflict with the Marriott's Employee Appearance standards and/or dress code); *see also* U.S. Dep't of Justice, Religious Discrimination in Employment, http://www.justice.gov/crt/spec_topics/religiousdiscrimination/ff_employment.php (discussing pending DOJ cases involving an employer prohibiting

The "Classic East Coast collegiate style of clothing" is not exclusive of Muslim hijabi women.

A. No substantial deviation from Respondent's commercial look.

The Respondent improperly characterizes the hijab as little more than an item of clothing. A hijab is not a hat and Muslim women do not wear the hijab for fashion. Muslim women who wear a hijab do so because of a personal religious obligation.[115]

The Respondent's view of fashion is that they "never, ever wear hats"[116] and prohibit employees from wearing caps.[117] However, Respondent's view of fashion and prohibition on employees is contradicted by Respondent's other policies and actions. First, Respondent's "Look Policy" requires Models to wear clothing styles similar to the clothing sold by the

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religious headcoverings in *U.S. v. New York Metropolitan Transit Authority* and *U.S. v. Essex County*).

[115] *See Forde v. Baird*, 720 F. Supp. 2d 170 (D. Conn. 2010); *see* Council on Am.-Islamic Relations, *Mich. v. Callahan*, 2010 U.S. Dist. LEXIS 41924, at *12 (E.D. Mich. 2010); *see Kaukab v. Harris*, 2003 U.S. Dist. LEXIS 13710 (N.D. Ill. 2003). Personal beliefs not mandated by a religious organization can constitute a religious belief. *Eddie Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1988). Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 386 (1997). The EEOC Guidelines allow for "dissenting views among members of particular religions about what the obligations of that religion might be" and self-definition regarding both belief and observance." EEOC, Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (2004).

[116] *See* EEOC, 798 F. Supp. 2d at 1278.

[117] EEOC, 731 F. 3d at 1111.

Respondent.[118] Respondent and its subsidiaries or affiliates, including but not limited to Hollister, sell hats to their customers.[119] The Respondent sells hats throughout the year and not just merely when hats are seasonal.[120] The hats are sold in various colors, styles, and fabrics.[121] The Respondent also partners with other companies to sell caps and hats within the Respondent's stores.[122] Thus, the Respondent's "Look Policy" cannot be invoked as a basis to exclude any woman who wears a hijab, scarf or other head covering when inconsistent with other policies.

Second, the Respondent can easily allow for employees who wear hijabs, to wear hijabs of similar color or pattern as the scarfs sold by the Respondent. This is an accommodation that aligns with the power of Respondent's human resources managers to grant

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[118] *See* Brief of Respondent in Opposition for Writ of Cert, EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86 at 2 (S. Ct. Aug. 27, 2014).

[119] *See Abercrombie & Fitch Stores, Inc.*, http://www.abercrombie.com/shop/us/womens-caps-accessories/embellished-beanie-3552604_01 (last visited Nov. 5, 2014) (embellished beanie); *see Abercrombie & Fitch Stores, Inc.*, http://www.abercrombie.com/shop/us/womens-caps-accessories/dots-ball-cap-3020593_01 (last visited Nov. 5, 2014) (dots ball cap); *see e.g.*, *Hollister*, http://www.hollisterco.com/shop/us/girls-hats/felt-floppy-hat-2526574 (last visited Nov. 5, 2014) (felt floppy hat); *see e.g.*, *Hollister*, http://www.hollisterco.com/shop/us/girls-hats/classic-winter-beanie-3588571 (last visited Nov. 5, 2014) (winter beanie).

[120] *Id.*; *Abercrombie & Fitch Stores, Inc.*, http://www.abercrombie.com/shop/us/p/woolrich-with-a-and-ampf-buffalo-checked-wool-baseball-cap-3555573 (last visited Nov. 10, 2014) (Woolrich with A&F Buffalo Checked Wool Baseball Cap).

[121] *Id.*

[122] Tim Feran, *Abercrombie & Fitch offers another outside brand—Woolrich*, THE COLUMBUS DISPATCH, Nov. 4, 2014;

accommodations that do not distract from the brand.[123] The Respondent sells scarfs throughout the year and not just merely when scarfs are in season.[124] The scarfs are also sold in various colors, styles, and fabrics.[125] The appearance of women wearing a hijab who seek employment with the Respondent would not deviate substantially from the Respondent's Look Policy.

Furthermore, the Respondent has permitted numerous exceptions to the "Look Policy" since 2001.[126] These exceptions include allowing employees to wear head scarfs, hijabs, and yarmulkes.[127] The Respondent has even allowed female employees to wear long skirts inconsistent with the type of skirts sold by the Respondent based on religious reasons.[128] The Respondent points to unsubstantiated allegations that providing an accommodation will impact

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[123] *See EEOC*, 798 F. Supp. 2d at 1276.

[124] *See e.g.*, *Abercrombie & Fitch Stores, Inc.*, http://www.abercrombie.com/shop/us/womens-fashion-scarves-accessories/duofold-plaid-scarf-3621617_01 (last visited Nov. 5, 2014) (duo fold plaid scarf); *see e.g.*, *Abercrombie & Fitch Stores, Inc.*, http://www.abercrombie.com/shop/us/womens-fashion-scarves-accessories/cozy-plaid-scarf-2722087_01 (last visited Nov. 5, 2014) (cozy plaid scarf); *see e.g.*; *Hollister*, http://www.hollisterco.com/shop/us/girls-accessories/vintage-plaid-scarf-2463070 (last visited Nov. 5, 2014); *see e.g.*, *Hollister*, http://www.hollisterco.com/shop/us/girls-accessories/supersoft-infinity-scarf-3577608 (super soft infinity scarf).

[125] *Id.*

[126] In a separate case, the Respondent acknowledged that Respondent has made at least seventy exceptions to the "Look Policy." 2013 U.S. Dist. LEXIS 51905, at *7.

[127] *Id.*; EEOC, 798 F. Supp. 2d at 1279–80, 1287; EEOC, 731 F.3d at 1113, 1115.

[128] 798 F. Supp. 2d at 1280.

the brand, sales, and compliance.[129] However, the Respondent has been unable to demonstrate that these exceptions to the "Look Policy" have incurred significant cost and/or actual hardship to its business.[130]

B. The Respondent's "look" is not exclusive of Muslims.

The Respondent's "look" is not exclusive of Muslims.[131] Muslim hijabi college students also embrace Abercrombie & Fitch's "classic East Coast collegiate style of clothing." Muslim hijabi college students in their daily activities sport graphic shirts, cardigans, and embossed lettering shirts and sweaters, a staple of the Respondent's clothing "look" and clothing line.[132] Muslim hijabi women are part of Abercrombie & Fitch's targeted college population. Notably as students at preppy collegiate institutions like Harvard, Princeton, and UC Berkeley,[133] as well

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[129] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1279–80, 1287 (N.D. Okla. 2011).

[130] EEOC, 798 F. Supp. 2d at 1287 (Abercrombie has not "measured whether [exceptions to look policy] have had any negative impact on how customers view the Abercrombie style").

[131] Jamie Feldman, *Stylish Blogger Reminds Us: 'The Hijab And Fashion Are Not Mutually Exclusive'*, HUFF POST, Jan. 13, 2014.

[132] *See 3 Way to Wear a Graphic Tee if You're Done with Bum Sweats*, MUSLIM GIRL, Oct. 13, 2014, http://muslimgirl.net/8210/graphic-tee-3-ways/ (last visited Nov. 18, 2014); *see also* Turban Outfitters 48, http://www.turbanoutfitters48.com/products (last visited Nov. 18, 2014).

[133] *See* Muslim Students Association, *Hijabi Monologues*, http://www.princeton.edu/~msa/events.html; *see* Anna Challet, *Young Muslims Choosing to Wear the Hijab Despite Rising Tide of Islamophobia*, NEW AMERICAN MEDIA, Apr. 21, 2014,

as members of Muslim sororities such as Gamma Gamma Chi Sorority, Inc. and Mu Sigma Alpha Sorority, Inc.[134]

The clothing choices of Muslim hijabi women who have interviewed for employment with the Respondent, further demonstrates that Muslim hijabi women are part of the Respondent's branding and image. Halla Banafa, who was also rejected in an interview by Respondent for wearing a hijab, wore skinny jeans and a colorful, non-black head scarf to her interview.[135] Ms. Elauf, a Muslim woman, wore an Abercrombie-like T-shirt and jeans to her interview with Respondent.[136]

Muslim women, just like other American women, are diverse and fashionable.[137] Islam does not dictate

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http://newamericamedia.org/2014/04/young-muslims-choosing-to-wear-the-hijab-despite-rising-tide-of-islamophobia.php.

[134] Mu Sigma Alpha (founded at the University of Michigan), https://www.facebook.com/pages/Mu-Sigma-Alpha-First-Undergraduate-Muslim-Sorority/127457574030953; Gamma Gamma Chi Sorority, Inc., http:// gammagammachi.org/splash/ (sorority has chapters in Washington DC, New Jersey, Pennsylvania, Illinois, North Carolina, and Georgia).

[135] *EEOC v. Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids*, No. 10-cv-03911-EJD (N.D. Cal. 2013).

[136] EEOC, 731 F.3d at 1113.

[137] *See* Amarra Ghani, Muslim 'Hipsters' Turn A Joke Into A Serious Conversation, NPR, Dec. 28, 2013, http://www.npr.org/blogs/codeswitch/2013/12/28/250786141/muslim-hipsters-turn-a-joke-into-a-serious-conversation (last visited Nov. 7, 2014); Homa Khaleeli, *The Hijab Goes High Fashion*, THE GUARDIAN, July 27, 2008; *see* Shaimaa Khalil, *Muslim Designers Mix the Hijab with Latest Fashions*, BBC NEWS, May 14, 2010, http://www.bbc.co.uk/news/10105062; *see also* Haute Hijab, http://www.hautehijab.com/.

what outfil or colors Muslim women can wear.[138] "Many people are not used to seeing a woman wearing a hijab with, say, a Chanel bag. But there's no reason a Muslim woman, like any other woman, couldn't do so."[139] Yunalis Zara'ai, a Muslim woman who wears skinny jeans, is featured in Barneys New York ad campaign.[140] Donna Karan New York ("DKNY") also markets fashionable dress to Muslim women, namely by opening an affiliate store called DKNY Ramadan.[141] Recently, Ibtihaj Muhammad, a member of the U.S. fencing team and a Muslim woman, opened Louelle in Los Angeles.[142] Louelle is a clothing store catering to "women who combine modest dressing with fashion."[143] The Respondent's "look" is not exclusive of Muslims.

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[138] *See* Jamie Feldman, *Stylish Blogger Reminds Us: 'The Hijab And Fashion Are Not Mutually Exclusive'*, HUFF POST, Jan. 13, 2014.

[139] Ellie Krupnik, *Muslim Clothing Gets Chic with 'Hijab Couture'*, HUFF POST, June 6, 2013.

[140] *See* Chen May Yee, *A Malaysian Pop Star Clad in Skinny Jeans and a Hijab Yuna Has Become Poster Girl for Young 'Hijabsters'*, THE INT'L NY TIMES, Oct. 13, 2014.

[141] *See* Aya Batraway, *Young Muslim Women Want to Fuse Fashion with Faith*, DETROIT FREE PRESS, Oct. 20, 2014.

[142] *See* Aya Batraway, *Hijabi Hipsters Fuse Fashion with Faith*, THE DAILY TELEGRAPH, Oct. 21, 2014.

[143] *Id.*

CONCLUSION

Amicus respectfully urges the Court to reverse the Tenth Circuit decision in this Case and find in favor of the Petitioner.

Respectfully submitted,

ABED A. AYOUB
Counsel of Record
YOLANDA C. RONDON
ANDREW W. COX
AMERICAN-ARAB
ANTI-DISCRIMINATION COMMITTEE
1990 M Street NW, Suite 610
Washington, DC 20036
(202) 244-2990
aayoub@adc.org

December 10, 2014

APPENDIX

APPENDIX

Interest Statements of Amici Curiae

KARAMAH: Muslim Women Lawyers for Human Rights is a nonprofit organization committed to promoting human rights globally, especially gender equity, religious freedom and civil rights in the United States. It pursues its mission through education, legal outreach and advocacy.

Cornell University Islamic Alliance for Justice: Islamic Alliance for Justice is a student organization at Cornell University that aims to raise awareness and coordinate effective response to local, national, and global issues of social, economic and political justice. The Alliance engages in informational outreach activities as well as advocacy and discourse. This club intends to both provide a way for students interested in the Muslim world to become active in the political realm and to raise awareness of issues of injustice across campus and around the globe.

Penn State Muslim Students' Association: Four students with a vision to create a haven for Muslims on campus and to spread awareness and tolerance for Islam founded the MSA Penn State in February of 1964. With over 300 Muslims, the Penn State MSA celebrates 50 years of being a leading voice for understanding at University Park. We have a commitment to creating a climate of racial harmony and social justice.

No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, JEWISH SOCIAL POLICY ACTION NETWORK, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, NATIONAL CENTER FOR LESBIAN RIGHTS, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MARC D. STERN
General Counsel
THE AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022

DAVID T. GOLDBERG
Counsel of Record
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813
david@donahuegoldberg.com

DOUGLAS LAYCOCK
Robert E. Scott Distinguished Professor of Law
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903

TOBY J. HEYTENS
DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

Attorneys for Amici Curiae

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Ansonia Bd. of Educ. v. *Philbrook*,
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Beck v. *Univ. of Wis. Bd. of Regents*,
75 F.3d 1130 (7th Cir. 1996) 12

Bhatia v. *Chevron U.S.A., Inc.*,
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Bd. of Trustees of the Univ. of Ala. v. *Garrett*,
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Burrage v. *FedEx Freight, Inc.*,
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Cloutier v. *Costco Wholesale Corp.*,
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Dean v. *United States*, 556 U.S. 568 (2009) 21

Desert Palace, Inc. v. *Costa*, 539 U.S. 90 (2003) 15

Cases—Continued: Page(s)

Diaz v. *Pan Am. World Airways, Inc.*,
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EEOC v. *Alamo Rent-A-Car LLC*,
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EEOC v. *BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), cert. dismissed, 549 U.S. 1334 (2007).....16

EEOC v. *Red Robin Gourmet Burgers, Inc.*,
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EEOC v. *Sambo's of Georgia, Inc.*,
530 F. Supp. 86, 91 (N.D. Ga. 1981) 30

EEOC v. *WC & M*,
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Emp't Div. v. *Smith*, 494 U.S. 872 (1990) 19

Fernandez v. *Wynn Oil Co.*,
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Global-Tech Appliances v. *SEB S.A.*,
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Gonzales v. *O Centro Espirita Beneficente UDV*,
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Cases—Continued: Page(s)

Graham Cnty. Soil & Water Conservation Dist. v. *United States ex rel. Wilson*, 559 U.S. 280 (2010).....15

Grayson v. *Schuler*, 666 F.3d 450 (7th Cir. 2012)....20

Hernandez v. *Comm'r of Internal Revenue*, 490 U.S. 680 (1989).....21

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Kalsi v. *New York City Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998), aff'd, 189 F.3d 461 (2d Cir. 1999).....26

Keith v. *County of Oakland*, 703 F.3d 918 (6th Cir. 2013) 9

Megivern v. *Glacier Hills, Inc.*, 519 Fed. Appx. 385 (6th Cir. 2013) 15

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Torcaso v. *Watkins*, 367 U.S. 488 (1961).....21

Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977).....*passim*

Turner v. *Boy Scouts of Am., Inc.*, No. CIV-09-180-C, 2009 WL 2567962 (W.D. Okla. Aug. 17, 2009).....21

Cases—Continued: Page(s)

United States v. *Gonzales*, 520 U.S. 1 (1997).....20

Vetter v. *Farmland Indus., Inc.*,
120 F.3d 749 (8th Cir. 1997) 21

Statutes and Legislative Materials:

Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 255 (1964)..7

Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (1972) 8

31 U.S.C. § 3130(e)(4) 15

42 U.S.C. § 2000e(j).....*passim*

42 U.S.C. § 2000e(k).....15

42 U.S.C. § 2000e(m).....9, 27

42 U.S.C. § 2000e-2(a)(1) 7, 17

42 U.S.C. § 2000e-2(a)(2) 32

42 U.S.C. § 2000e-2(m) 17, 19

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42 U.S.C. § 12112(d)(2) 24

42 U.S.C. § 12112(d)(3) 24

42 U.S.C. § 12112(d)(4) 24

18 Cong. Rec. 706 (1972).....13

Administrative Materials: Page(s)

29 C.F.R. § 1605.3(b)(2) 23

EEOC Compliance Manual, Section 12:
Religious Discrimination 12-IV(A)(2). 12

EEOC Enforcement & Litigation Statistics,
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EEOC, Pre-Employment Inquiries and
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F.B.I., *Uniform Crime Report, Hate Crimes Statistics, 2012*.....5

Other Materials:

Daron Acemoglu & Joshua D. Angrist,
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Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*,
25 Berkeley J. Emp. & Lab. L. 527 (2004).....6, 7

John J. Donohue III & Peter Siegelman,
The Changing Nature of Employment Discrimination Litigation,
43 Stan. L. Rev. 983 (1991) 7

Other Materials—Continued: Page(s)

Gallup Center for Muslim Studies, *In U.S., Religious Prejudice Stronger Against Muslims* (Jan. 21, 2010) 5

Linda Hamilton-Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995) 6

Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. Soc. Issues 221 (2012).....7

Romtin Parvaresh, Note, *Prayer for Relief: Anti-Muslim Discrimination As Racial Discrimination*, 87 S. Cal. L. Rev. 1287 (2014) 32

Pew Forum on Religion and Public Life U.S. Religious Landscape Survey (2008).....4

Restatement (Second) of Torts § 541 (1977) 14

Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. Rev. L. & Soc. Change 103 (2012).....32

INTEREST OF *AMICI CURIAE*[*]

As described more fully in the annexed appendix, *amici* are organizations with long involvement in addressing religious discrimination in the workplace and urging the adoption and enforcement of laws to make workplaces more open to and inclusive of Americans of all backgrounds. All of us are committed to protecting religious liberty, combatting intolerance and bigotry, and promoting understanding and dialogue in our increasingly religiously diverse Nation.

INTRODUCTION & SUMMARY OF ARGUMENT

A. Religion-based employment discrimination remains a significant problem. The problem is particularly acute for members of minority faith traditions, whose beliefs and practices are often (unlike in this case) poorly understood by employers. These challenges are only exacerbated at the hiring stage, where decisions are more likely to be influenced by stereotypes and generalizations and where compliance with antidiscrimination law is especially difficult to monitor and enforce.

Since its enactment, Title VII has ranked discrimination based on religion alongside that based on race, sex, and national origin. In 1972, Congress amended the statute to clarify that religious

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[*] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

discrimination goes beyond decisions that disfavor an employee or prospective employee based on her religious affiliation. Rather, Congress recognized that, for many Americans, "religion" is about *practices* as much as beliefs; that these practices, which can mark adherents as visibly different from others, themselves occasion prejudice; and that workplace practices developed with only the religious observances of workers from mainstream faith backgrounds in view can subject employees from other traditions to intolerable work-faith conflicts. Accordingly, Congress declared that an employer's inflexible refusal to reasonably accommodate an employee's religious observance or practice is itself a form of prohibited discrimination.

As Congress recognized, some such conflicts may be genuinely insolvable. But the vast majority can be resolved through employee-employer discussion and relatively simple accommodations. For that reason, Title VII's religion provisions should be interpreted to encourage "bilateral cooperation" between employers and current or prospective employees. *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted).

B. The Tenth Circuit's decision disregards these core principles by imposing unique and onerous requirements on applicants and employees who seek to establish religion-based discrimination. These requirements lack support in Title VII's text, structure, and history, as well as common sense. Both the Tenth Circuit's rule and the reasoning offered in support of it reflect a narrow and grudging understanding of religion, religious practice, and religious accommodation that stands in stark contrast

to what Congress codified in Title VII. Especially troubling are the *practical* effects of allowing the Tenth Circuit's rule to stand. The decision below did not simply short-circuit a case where there is ample evidence to sustain a finding of a Title VII violation: it provided a detailed roadmap for employers, particularly those making hiring decisions, to circumvent the statute's equal opportunity mandate.

The Tenth Circuit was right in at least one respect: The proper approach must not give employers license to ask applicants all manner of questions about their religious beliefs or observances. At the same time, those concerns may properly be addressed through a different rule, one more consistent with both the statute and the realities of the workplace. Simply put, when an employer has enough information to reasonably perceive a potential conflict between its work requirement and an applicant's religious observance, the employer should initiate a process of bilateral cooperation to determine the presence and scope of any conflict and the need for an accommodation.

C. *Amici* also are concerned about an issue that forms part of the backdrop for this case and that may arise on remand: the claim that permitting Ms. Elauf to wear a hijab at work would cause respondent's business "undue hardship," on the theory that doing so would deviate from the "look" respondent and its customers prefer salespeople to maintain.

Such broad and casual assertions of a need for complete homogeneity are, we submit, often unfounded. More fundamentally, however, *amici* urge that this Court take care not to endorse the premise, which some lower court decisions have too

readily accepted, that actions catering to customer (or co-employee) prejudice are within the statute's "undue hardship" defense. In a wide range of contexts, including race and sex discrimination, Congress, this Court, and influential lower court decisions have recognized that indulging such preferences, even for "business" reasons, is itself a form of intentional discrimination. That is no less true in cases involving religious bias, and *amici* urge that the Court refrain from giving the notion even indirect encouragement here.

ARGUMENT

I. Title VII's Protection Against Religious Discrimination Is Vitally Important

A. Religion-Based Employment Discrimination Remains a Serious Problem

1. Although it has been 50 years since Congress prohibited employment discrimination based on religion, such discrimination remains a serious and persistent problem. The annual number of religious discrimination charges filed with the EEOC has more than doubled since 1997, see EEOC Enforcement & Litigation Statistics, Charge Statistics FY 1997-2013, even as (or, perhaps, in part because) America has become much more religiously diverse.[1]

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[1] See Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey 5-6 (2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (finding that "the United States is on the verge of becoming a minority Protestant country," and that "[i]mmigrants are also disproportionately represented among several world religions in the U.S., including Islam, Hinduism and Buddhism").

As with other forms of bias, some workplace discrimination against religion reflects "insensitivity caused by simple want of careful, rational reflection or * * * some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). But open bias against adherents of particular faiths remains part of the current landscape. As particularly relevant to this case, large numbers of Americans—some 43% of respondents in a 2010 Gallup survey—are willing to "*admit* to feeling at least 'a little' prejudiced toward Muslims."[2] See also FBI, *Hate Crimes Statistics 2012*, http://tinyurl.com/lo8f3m9 (reporting that nearly 1 in 5 hate crimes was religiously motivated, and 59.7% of these targeted Jewish victims).

The individual costs and burdens imposed by anti-religious prejudice are substantial, especially in economic conditions where employment opportunities can be scarce. At the same time, the *benefits* of antidiscrimination laws go well beyond those immediately protected. Both employers and "the larger society" benefit when the talents and productive capacity of religious individuals are put to full use. *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). Like other civil rights laws, Title VII gives employers (and co-workers, and customers) "an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for

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[2] *In U.S., Religious Prejudice Stronger Against Muslims*, Gallup Center for Muslim Studies (Jan. 21, 2010), http://www.gallup.com/poll/125312/religious-prejudice-stronger-against-muslims.aspx (emphasis added).

accepting" people whose religious traditions may differ from their own. *Ibid.*

2. As many courts and scholars have observed, discrimination at the hiring stage is an especially pervasive and intractable problem. For one thing, employers generally have far more limited information about applicants than about current employees. As a result, it is more likely that employers will resort to the sort of group-based stereotyping and assumptions that can be particularly disadvantageous to members of groups whose beliefs and practices tend to be unfamiliar in the workplace. See Linda Hamilton-Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1188-1204 (1995).[3]

At the same time, the nature of the hiring process makes it much harder to enforce compliance with antidiscrimination obligations. A *former employee* who suspects that her discharge was discriminatory often will have both a strong incentive to pursue

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[3] As scholars have concluded with respect to the Americans with Disabilities Act, the fact that an applicant may be entitled to seek a reasonable accommodation under the statute may itself tilt the hiring decision against her, especially when the employer overestimates the costs that an adjustment would entail. See Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 Berkeley J. Emp. & Lab. L. 527, 536-537 (2004); Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. Pol. Econ. 915, 916-917 (2001); see also *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977) (equating reasonable religious accommodation with measures that entail "de minimis" cost).

redress and sufficient knowledge about the employer's practices to substantiate her claim. In contrast, unsuccessful *applicants* rarely have access to the kind of information needed to determine, let alone prove, that discrimination played a role in an employer's decision.[4] Even when they suspect discrimination, moreover, people in need of employment (especially, as here, entry-level employment) may sensibly choose to devote their energies to the ongoing job search rather than investigating and litigating one particular firm's refusal to hire. And for all of these reasons, people who have been subject to unlawful discrimination at the hiring stage are far less likely than those claiming discriminatory discharge to be able to obtain counsel to vindicate their rights. See also Bagenstos, 25 Berkeley J. Emp. & Lab. L. at 557 (explaining that employers' perceptions that litigation and liability risks of discriminating at the hiring stage are low may raise the prevalence of such behavior).

B. Title VII's Religious Accommodation Provision Plays a Central Role in Securing Equal Opportunity

Since 1964, Title VII has barred employers from "discriminat[ing] against" an employee or prospective employee "because of" that individual's "religion." 42 U.S.C. § 2000e-2(a)(1); Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 255. The original statute did not define "religion," however, which triggered questions about whether it reached

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[4] See, *e.g.*, Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. Soc. Issues 221, 222 (2012); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1028 (1991).

employer practices that burdened various aspects of religious observance and whether and to what extent employers' refusal to accommodate an employee's religious needs was actionable. See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 72-73 (1977) (describing history).

In 1972, Congress amended Title VII to provide a definition of "religion." Pub. L. No. 92-261, § 2(7), 86 Stat. 103. Although many mainstream Protestant denominations often place *belief* at the center of religious identity, Congress recognized that other faith traditions—including some of those least understood and most likely to be discriminated against—view various *practices* as integral to what it means to be religious. What is more, Congress recognized, workplaces and work schedules have long been structured in ways that harmonize with the religious observances of adherents of long-recognized, mainstream faiths. (It is hardly a coincidence that few offices are open on Sundays or that, at least in many parts of the United States, almost no employers require employees to work on Christmas or Easter.) For these reasons, adherents of "minority" faiths are *particularly* likely to encounter conflicts between their religious observances and employers' generally applicable workplace rules.

Congress addressed these realities in two ways. First, it clarified that discrimination based on a person's religious observances and practices is itself prohibited religious discrimination. See 42 U.S.C. § 2000e(j) (stating that "[t]he term 'religion' includes all aspects of religious observance and practice"). Second, Congress declared that employers have an obligation "to reasonably accommodate" all "religious

observance[s] or practice[s]." *Ibid.* That accommodation requirement, however, is not without limit. Rather, Congress provided that no accommodation is required if an employer can "demonstrate[]" that providing one would cause "undue hardship on the conduct of the employer's business." *Ibid.*; see 42 U.S.C. § 2000e(m) (1991 amendment providing that, as used in Title VII, the term "demonstrates" means "meet[ing] the burdens of production and persuasion").

As this Court has explained, a central aim of this provision is to identify and ultimately achieve "an acceptable *reconciliation* of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted; emphasis added). Reasonable accommodation is thus a *process* that involves an interaction between the employer and the current or prospective employee. Cf. *Keith* v. *County of Oakland*, 703 F.3d 918, 929 (6th Cir. 2013) ("The duty to engage in [an] interactive process with a disabled employee is mandatory and requires communication and good-faith exploration of possible accommodations.") (internal quotation marks and citations omitted). Employers may need help understanding the existence and precise scope of employees' religious needs. Employees, in turn, may lack an understanding of work requirements and which particular components of a request for an accommodation could prove especially burdensome on the employer. Prospective employees in particular often have only a limited understanding of the employer's business and thus will not know that their religious practice requires accommodation. The "bilateral cooperation" of which this Court spoke in

Philbrook, 479 U.S. at 69 (citation omitted), is thus essential to ensuring that employment decisions are based on facts, not fears or overbroad generalizations.

II. The Tenth Circuit's Rule Undermines Both Title VII's Central Purpose and Its Central "Bilateral Cooperation" Mechanism

No one disputes that respondent refused to hire Ms. Elauf "because of her headscarf." Pet. App. 9a. Yet the Tenth Circuit concluded that the EEOC failed to make out even a *prima facie* failure-to-accommodate case of religious discrimination. *Id.* at 28a.

The Tenth Circuit's decision is wrong. If allowed to stand, the rules it endorsed will reward willful blindness and undercut the "bilateral cooperation" that this Court has recognized as the central mechanism for advancing Title VII's equal opportunity objective. The multiple, highly restrictive requirements the court purported to derive from the Title VII *prima facie* case are not supported by—and are, in critical respects, contrary to—the statutory text. Nor are they warranted by the policy considerations cited by the court below. The Court should reverse the decision and make clear that an employer—or employee—who reasonably perceives a conflict between a work requirement and religious practice is subject to the bilateral cooperation responsibility.

A. The Tenth Circuit's Approach Would Reward Willful Blindness and Short-Circuit Bilateral Cooperation

Under the Tenth Circuit's approach, a Title VII claim fails at the threshold unless the relevant

decisionmakers actually learn directly from the applicant or employee herself, see Pet. App. 29a, that she engages in certain practices for religious reasons and feels "obliged by [her] religion" to do so. *Id.* at 52a. This is so whether or not the applicant or employee knows or has reason to know of a work requirement that might collide with her religious practice or whether the employer suspects (correctly) that such an accommodation would be necessary.

This approach provides a simple roadmap for any employer who wants to engage in intentional hiring discrimination based on religion: Don't ask, don't tell. Whether motivated by outright animus, a disposition to cater to the prejudices of employees or customers, or a simple desire to avoid the perceived burdens of the statute's reasonable accommodation process, an employer operating under the Tenth Circuit's rule need ensure only that it never obtains "particularized, actual knowledge," Pet. App. 36a-40a, of an applicant's religious observances and practices.[5]

Rewarding such willful or pretended ignorance (or worse) is the antithesis of how Title VII is meant to work. There can be no "reconciliation of the needs of

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[5] Concerns about intentional circumvention of—and outright hostility toward—the reasonable accommodation responsibility are hardly hypothetical. The evidentiary record the Tenth Circuit held insufficient to state a *prima facie* case included testimony by Cooke, respondent's employee who interviewed Elauf, that Johnson, the supervisor who directed her to lower Elauf's score based on the hijab, had answered Cooke's statement that Elauf was "a very good candidate" by saying, "[y]ou still can't hire her because someone [else] can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them." Pet. App. 99a.

the employee's religion and the exigencies of the employer's business" (*Philbrook*, 479 U.S. at 69 (citation omitted)), unless both sides know there is a need for reconciliation in the first place. And there will be no "bilateral cooperation," *ibid.*, if an employer who has enough information to reasonably perceive (as this employer did) that a particular practice is religious in nature may simply decline to hire an applicant because of that very practice without making any inquiry into the nature of the conflict or the feasibility of accommodating it.[6]

The inevitable result of the Tenth Circuit's approach will be refusals to hire otherwise qualified people whose religious needs would actually entail no hardship whatsoever. For one thing, this will be so in situations where the bilateral process the employer preempts would have yielded a mutually satisfactory reconciliation. See EEOC Compliance Manual, Section 12: Religious Discrimination 12-IV(A)(2) (stating that "[e]mployer-employee cooperation and flexibility" are "key to the search for a reasonable accommodation"). But it will also occur in situations where discussion would reveal there is *no* actual work-faith conflict, either because the employer made unwarranted assumptions about the applicant's

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[6] The Tenth Circuit itself has, in cases involving "reasonable accommodation" under the Americans with Disabilities Act, recognized the need to police opportunistic employer behavior. See *Davoll* v. *Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999) ("[Employer] cannot preempt the interactive process with its policy and actions and then escape liability by claiming [the ADA plaintiff] did not properly initiate the process."); cf. *Beck* v. *Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("[N]either party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability.").

religious needs or because the applicant would not have sought accommodation had she known the nature of and reasons for the employer's rules. Cf. 18 Cong. Rec. 706 (1972) (statement of Sen. Randolph) ("I think that usually the persons on both sides of the situation, the employer and the employee, are of an understanding frame of mind and heart * * * I think they are just building upon conviction, and, hopefully, understanding and a desire to achieve an adjustment[.]").

The Tenth Circuit's approach could prove especially problematic in the modern hiring environment. Consider an employer who relies entirely on an online application form to winnow the applicant pool. Under the Tenth Circuit's approach, such an employer would exempt itself from the religious accommodation process altogether by requiring all applicants to check a box stating that they would be available to work "all seven days of the week," without providing Sabbath-observing applicants with any means to make the disclosure on which the Tenth Circuit rule makes their Title VII rights (and the employer's responsibilities) depend.[7]

But it is actually worse than that. The Tenth Circuit's approach gives religiously observant applicants only one reliable means of preserving their Title VII rights: inform *every* prospective employer, at the very outset, of *every* religious observance or practice that might *conceivably* conflict with *any* rule or requirement that the employer might *possibly*

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[7] A Sabbath-observing applicant who checked the box in order to get to the next stage of the hiring process would risk disqualification for dishonesty or being denied an accommodation on waiver grounds.

have. For example, an Orthodox Jewish applicant might disclose that he, among many other things, observes the Sabbath, keeps kosher, wears a yarmulke, will not work on Yom Kippur, and observes the laws of shatnez, which forbid wearing garments that combine linen and wool; a Muslim applicant might mention the hijab, the rules of halal, daily prayers, the Ramadan fast, and so forth. Many of the so-disclosed practices and observances would never give rise to actual conflicts. Yet it is not difficult to imagine that an employer, faced with such a disclosure by one applicant among many similarly qualified ones, might swiftly move that application to the bottom of the pile.

B. The Tenth Circuit's Rule Is Unsupported By and Is, in Central Respects, Contrary To The Statute

The Tenth Circuit's rule has three main features: (1) an applicant herself must "provide the employer with explicit notice" of the need for a religious accommodation, Pet. App. 29a; (2) a plaintiff must show that the employer had "particularized, *actual* knowledge of the key facts that trigger its duty to accommodate," *id.* at 34a; and (3) the religious practice that motived the employer's decision must be "inflexible," *id.* at 23a. None of those requirements has any basis in the statutory text. And none warranted dismissing the EEOC's claim at the *prima face* case stage.

1. First-Party Notice. It is black-letter law that a party who has actual knowledge of a fact may not claim ignorance of that fact for purposes of establishing or defeating liability. See, *e.g.*, Restatement (Second) of Torts § 541 (1977) ("The recipient of a fraudulent misrepresentation is not

justified in relying upon its truth if he knows that it is false or its falsity is obvious to him."); cf. *Graham Cnty. Soil & Water Conservation Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280 (2010) (interpreting "public disclosure" bar under False Claims Act, 31 U.S.C. § 3130(e)(4)).

Title VII is no exception. Nothing in the statutory text limits its prohibition to discrimination "because of" an individual's race, color, sex, national origin or religion, 42 U.S.C. § 2000e-2, to information that the employer learned from the very individual in question.[8] An employer who learns from someone other than the applicant that the applicant is African American, female, or Mexican-American and takes action on that basis is no less liable for employment discrimination than one who acts after having being told so by the prospective employee. See, *e.g.*, *Megivern* v. *Glacier Hills, Inc.*, 519 Fed. Appx. 385, 389, 396 (6th Cir. 2013) (plaintiff raised triable claim of pregnancy-based sex discrimination, 42 U.S.C. § 2000e(k), where decision-maker learned of pregnancy from plaintiff's co-worker); *Hitchcock* v.

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[8] The Tenth Circuit's arbitrary, atextual rule limiting actionable awareness to that gained directly from the applicant echoes the rule rejected in *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003), which had held that only "direct evidence" of discrimination could entitle a Title VII plaintiff to "a mixed-motive" jury instruction. *Id.* at 92. *Desert Palace* explained that a Title VII plaintiff, like litigants in other civil cases, must simply "prove his case by a preponderance of the evidence," *id.* at 99 (internal quotation marks, brackets, and citation omitted), and then canvased decisions from a variety of settings recognizing that direct evidence is not intrinsically more probative. The same is true here: knowledge gained through observation or inference can be as reliable as that obtained through first-party communication.

Angel Corps, Inc., 718 F.3d 733, 734-735 (7th Cir. 2013) (similar); cf. *EEOC* v. *BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 478 (10th Cir. 2006) (reinstating Title VII race discrimination claim where "[i]t [was] undisputed that the human resources official who made the decision to terminate Mr. Peters worked in a different city [and] had never met [him]"), cert. dismissed, 549 U.S. 1334 (2007).

There is no warrant for treating Title VII claims alleging religious discrimination differently from these other claims. An employer who dismisses a new hire after being told by a third-party that the employee is a Mormon (or that he wears distinctive garments as part of his religious faith) is no less liable for discrimination than an employer who does the same after hearing that the employee is Greek-American.

It is true that the religious character of certain practices may be nonobvious or genuinely obscure and that "employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects." *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 449-450 (7th Cir. 2013) (citation and internal quotation marks omitted). But that also can be true of other characteristics that Title VII forbids employers from relying upon. See *Hitchcock*, 718 F.3d at 734 (case involving employee who was three months pregnant). The reason an employer who genuinely does not know that a particular practice is religious is not subject to Title VII liability is the same as the reason liability may not be imposed if he is unaware a rejected applicant is Mexican-American: The statute requires a showing that the protected trait "was a motivating factor" in

the challenged decision. 42 U.S.C. § 2000e-2(m). But the statute is silent—and utterly indifferent to—the *source* of the employer's information.

2. Particularized, Actual Knowledge. The Tenth Circuit's further insistence that an employer have "particularized, *actual* knowledge of the key facts that triggered its duty to accommodate," Pet. App. 34a, is equally erroneous. Once again, such a rule finds no support in the statutory text, which simply requires a plaintiff to show that an employer discriminated against him "because of" his "religion." 42 U.S.C. § 2000e-2(a)(1).

The Tenth Circuit concluded that no such showing could be made here: Because the decisionmakers simply "*assumed*" and "*figured*" but "did not know," Pet. App. 40a (quoting testimony, emphasis added by Tenth Circuit) that Ms. Elauf wore a hijab for religious, rather than personal, reasons, the opinion reasoned, respondent could not have discriminated against her "because of" her religion. *Id.* 41a.[9]

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[9] The court used the term "particularized" to impose an unusually onerous communication burden. No one would argue that an employer should be liable for failing to accommodate an employee who walked off the job in the middle of a Friday work-shift if the employer knew he was Jewish, but had no idea—and was not even told by the employee at the beginning of the Friday afternoon shift—that he was a Sabbath observer. See Pet. App. 50a-51a (discussing this hypothetical). But under the Tenth Circuit's hyper-charged version, an Orthodox Jew who wears a yarmulke to work each day could be denied accommodation for that practice unless he had expressly negated the hypothesis, *never actually entertained by his longtime employer*, that he did so for nonreligious reasons. See Pet. App. 7a.

On the metaphysical plane to which the decision below

That is simply wrong. An anti-Semitic supervisor who relentlessly harasses a Jewish employee named Goldstein cannot avoid Title VII liability by pointing out that there also are gentiles with that surname and asserting that he simply *assumed* but did not truly *know* that this particular Goldstein was Jewish. The possibility that an employer who makes an adverse decision based on a prohibited characteristic *could have been* (but was not in fact) wrong about whether the employee possessed the characteristic is not ordinarily grounds for relieving the employer of liability.[10] Rather, liability is properly imposed whenever an employer takes adverse action based on those suppositions, without doing anything to dispel purported lingering uncertainty. Accord 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the

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seemed to repair, an employer would not "actual[ly] *know*[]" that an applicant's reasons were religious even if she had told the employer in so many words. Cf. pp. 15-17, *supra*. Indeed, respondent actively challenged Ms. Elauf's religious bona fides after she had stated them in sworn testimony. See Pet. App. 111a-115a (rejecting arguments that Elauf must be insincere because the Quran does not expressly require the hijab and because she did not attend mosque with sufficient frequency).

[10] There is some division in the lower courts over cases where an employer's assumptions turned out to be wrong. Compare *Burrage* v. *FedEx Freight, Inc.*, No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio March 29, 2012) (rejecting claim by employee subject to intense workplace harassment grounded on the mistaken assumption that he was Mexican-American), with *EEOC* v. *WC & M*, 496 F.3d 393, 401 (5th Cir. 2007) (sustaining claim on behalf of Indian-American Muslim whom harassers mistakenly believed was Arab). But *amici* are aware of no decision before the one below suggesting that an employer may avoid liability simply by asserting that it *could have been* mistaken about an employee's membership in a protected class.

complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor*") (emphasis added). Cf. *Global-Tech Appliances* v. *SEB S.A.*, 131 S. Ct. 2060, 2069 (2011) ("[P]ersons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.") (citation omitted).

3. *Inflexibility*. The Tenth Circuit's decision also included a lengthy and troubling discussion seemingly aimed at limiting the understanding of "religion" in cases where Title VII's accommodation duty is in issue. The court repeatedly suggested that an employer's accommodation responsibility is confined to only those religious observances and practices that an employee or applicant deems "inflexible" or "required," Pet. App. 23a, and perhaps further limited to religious practices grounded on "ultimate ideas about life, purpose and death," *id.* 16a (citation omitted; emphasis removed); see *id.* at 20a ("[E]ven if an applicant or employee claims to be acting for 'religious' reasons, if those reasons actually do not pertain to such ultimate ideas, then that person's conduct would fall outside the protective ambit of Title VII").

Such further limitations do not, as the decision below repeatedly asserted, follow from "Title VII's conception of religion." Pet. App. 41a, 46a, 55a. On the contrary, the court seemed to mine EEOC materials meant to ensure *protection*—for people with sincerely held, but heterodox or unfamiliar, religious beliefs—in order to enable employer claims of "lack of notice" in cases like this one, involving workers with familiar, mainstream religious practices which the employer recognized as such.

But the limitations are foreclosed by the plain text of Title VII in any event. The statute defines "religion" as including "*all aspects* of religious observance and practice, as well as belief," and it describes the employer's duty to accommodate as applying to "an employee's or prospective employee's religious observance or practice." 42 U.S.C. § 2000e(j) (emphasis added). Nothing in this provision suggests that the employer's obligation is limited to *some* aspects of religious observance, those an employee deems inflexible or mandatory. As the Court has stated in cases concerning the "expansive meaning" of the statutory term "any," the word must be understood to mean "all," unless Congress adds "language limiting the [term's] breadth," *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997), because the Court "ordinarily resist[s] reading * * * into a statute [words] that do not appear on its face," including "words of limitation." *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (internal quotation marks and citation omitted).

Title VII's refusal to distinguish among religious practices and observances makes perfect sense. It respects this Court's repeated "warn[ing]" against having courts try to "determine the place of a particular belief in a religion." *Emp't Div.* v. *Smith*, 494 U.S. 872, 887 (1990); cf. *Grayson* v. *Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) (observing, in RLUIPA case, that "a religious believer who does more than he is strictly required to do is nevertheless exercising his religion. A Catholic who vows to obey the Rule of St. Benedict and therefore avoid 'the meat of four-footed animals' is performing a religious observance even though not a mandatory one."). It also reflects the reality that many faith traditions, especially those

outside the three Abrahamic traditions, are not structured around a discrete set of "obligations." Cf. *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n.11 (1961) (recognizing nontheistic "religions in this country," Buddhism and Taoism).

To be sure, "[a]n employer need not accommodate a purely personal preference," *Vetter* v. *Farmland Indus., Inc.*, 120 F.3d 749, 751 (8th Cir. 1997) (internal quotation marks omitted), even one with some broad connection to religion, such as a preference to meet with one's minister during a time that overlaps with a work shift. See Pet. App. 24a (discussing *Turner* v. *Boy Scouts of Am., Inc.*, No. CIV-09-180-C, 2009 WL 2567962, at *2 (W.D. Okla. Aug. 17, 2009)). But any suggestion that less "important" practices or observances that an employee might be willing to forego *in order to keep his job* do not qualify for protection runs headlong into the principle that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez* v. *Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989).

C. Policy Considerations, Including Those Invoked Below, Support an Entirely Different Rule

The decision below cited two principal policy considerations for its rule. The first was the danger that an employer might be blindsided with Title VII liability for failing to accommodate a practice it was unaware was religious in character. See Pet. App. 46a-52a. The second was the perceived need to avoid placing employers between a rock and a hard place: Because "the EEOC discourages employers from making inquiries in the first instance regarding the religious beliefs or practices of applicants," *id.* at 24a,

the court of appeals reasoned, the burden must in all cases be placed on the applicant to make clear, on pain of dismissal, that a particular observance is religiously motivated and in need of accommodation. Neither rationale withstands scrutiny.

1. The blindsiding concern fails for two reasons. First, an employee who is actually aware of a conflict between her employer's rules and her religious needs already has strong incentives to point such conflicts out. It is, after all, a familiar adage that "you don't get what you don't ask for." In addition, the rare (if not entirely hypothetical) applicant or employee more focused on a future Title VII lawsuit than on actually having her religious needs met will understand better than others the litigation (and negotiation) value of making a clear accommodation request.[11]

Second, saying that a *suit may proceed* whenever an employer took adverse action based on an observance or practice the employer reasonably concluded was religious is not the same as saying that the employer will be subject to *liability*. Even if a Title VII plaintiff makes out a *prima facie* case, the employer may still prevail if it rebuts the inference of discrimination; if the employee did not uphold her side of the bilateral cooperative responsibility; if the employee refused a reasonable accommodation; or if good-faith exploration of potential accommodations

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[11] The situation might be somewhat different under the Americans with Disabilities Act. Considerations of privacy aside, a person dependent on employer-provided health insurance coverage and diagnosed with a costly-to-treat disease might be reluctant to place that information before her employer, even if doing so would entitle her to some helpful accommodation.

disclosed that none could be offered without causing the business "undue hardship." 42 U.S.C. § 2000e(j).

2. The Tenth Circuit's concern about prompting inappropriate inquiries by employers fails as well. As the court below acknowledged, the reason why the EEOC advises employers against initiating conversations about an applicant's religious beliefs or practices is because those matters "are *generally* viewed as *non job-related* and problematic under federal law." Pet. App. 24a-25a (emphasis added) (quoting EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs*). That rationale has no applicability where, as here, the employer actually observes an applicant engaged in a practice that would, in the employer's view, directly affect the applicant's suitability for the job. To respondent, Ms. Elauf's headscarf was not merely job-*related*—it was an automatic disqualifier, in fact the *only* reason she did not get the job. It is perverse to invoke the interest in protecting religious people from sensitive inquiries, one meant to ensure that qualified people are *hired* on a nondiscriminatory basis, in support of a rule that allows employers to *refuse* employment based on a practice or observance they understand to be religious. In this case, the question need not even have been explicitly religious. Rather, respondent's agents simply could have informed Ms. Elauf that the "Look Policy" would require the removal of any headcovering while at work and asked her if she could comply with that rule.

There are, as *amici* and the EEOC have recognized, serious concerns about intrusive questioning at the hiring stage. See 29 C.F.R. § 1605.3(b)(2) (recognizing influential role of

"representatives of organizations interested in the issue of religious discrimination" in urging rules, adopted by EEOC, limiting pre-employment inquiries). But there are far more nuanced—and far more effective—ways to address those concerns than the Tenth Circuit's sweeping and ultimately counterproductive approach. Most fundamentally, the focus must be on limiting the information that is requested and exchanged to that which is relevant to the job and any potential accommodation. In most cases (as here), any such inquiries can begin and end with the employer's identifying the potentially conflicting job requirement and inquiring about the prospective employee's ability and willingness to abide by it.

Practices under the Americans with Disabilities Act ("ADA") offer the template for a practicable approach. The ADA strictly limits the medical information that may be requested at the application stage. See 42 U.S.C. § 12112(d)(2)(A). At the same time, however, the statute permits employers to extend offers that are conditional on the outcome of job-related medical examinations, *id.* § 12112(d)(3), and it allows broader, though still regulated, testing of employees with disabilities after hire, *id.* § 12112(d)(4). Here, respondent could have extended an offer to Ms. Elauf, made provisional on determining whether her practice of wearing a headscarf was religious and, if so, whether that practice could be accommodated without undue hardship.

Such behavior by employers is not merely consistent with Title VII's purposes: it substantially advances them. As this case well demonstrates,

incomplete information sharing is often the first and primary barrier to reaching "an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Philbrook*, 479 U.S. at 69 (citation omitted). Congress also placed the responsibility of "reasonabl[e] accommodat[ion]" on the employer, subject to a defense of "demonstrate[ed] * * * undue hardship," 42 U.S.C. § 2000e(j). Accordingly, as Judge Ebel explained, "once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict in order to determine if there is a reasonable accommodation for the job applicant's religious practices." Pet. App. 86a.

This rule does not, of course, specify when *liability* will be imposed or even when accommodation must be extended. It does, however, give employers proper incentive to participate actively in the process and thereby maximize the prospect that an acceptable, reasonable accommodation will be reached whenever one is available.

* * * *

The facts of this case show the Tenth Circuit's rule to be not just wrong, but self-contradictory. If respondent had actually thought any of the things speculated about in the decision—if it had actually believed that Elauf's scarf might not be worn for religious reasons or that she might not request an accommodation—there would have been no reason to not make a job offer. She would neither require nor be entitled to an accommodation, and either she would remove the scarf or the offer could be withdrawn. Respondent refused employment precisely *because* it

believed the very things the Tenth Circuit says that Elauf failed to tell it—precisely *because* it understood that she would require an accommodation.

III. The Court Should Take Care Not To Endorse Customer Preference as a Proper Component of an Undue Hardship Analysis

This Court granted review to decide a question involving the standards governing a plaintiff's *prima facie* case. Accordingly, this brief has so far treated this case as if it involved a conventional conflict between a valid, neutral rule and a conflicting religious practice. See, *e.g.*, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977) (rejecting claim where accommodation would require employer to violate collectively bargained seniority system); *Kalsi* v. *New York City Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998) (rejecting claim by subway car inspector who would not wear hardhat for religious reasons), aff'd, 189 F.3d 461 (2d Cir. 1999); *Bhatia* v. *Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (sustaining employer's rule, challenged by Sikh employee, requiring all machinists to be clean-shaven, so they could wear respirators with gas-tight face seal).

It is important, however, to underscore the fundamental difference between the interests asserted by respondent here and those by employers in these just-cited cases and others where religious accommodation is similarly difficult. Respondent does not claim that permitting Ms. Elauf to wear a hijab while working would have prevented her from ringing up customers, answering their questions, re-folding inventory, or any of the other tasks typically performed by entry level sales associates. Nor does respondent claim that permitting Ms. Elauf to wear a

hijab would compromise her own safety or that of others (as in *Kalsi*) or adversely affect other employees' bargained-for rights (as in *Hardison*). Instead, the only claim of "hardship" that respondent has offered is that its business would be set back as a result of customers' (hypothesized) negative reactions to Ms. Elauf's "look" when she wore the hijab.

This Court has never endorsed customer preference as a valid ground for an undue hardship defense to a religious discrimination claim under Title VII. But some lower courts have done so. And *amici* urge that, at minimum, the Court resolve this case in a way that takes care to avoid any appearance of endorsing those holdings.

A. Title VII grants employers an "undue hardship" defense in cases where the adverse action is taken because of "religious observance[s] or practice[s]," as against "belief[s]." 42 U.S.C. § 2000e(j). The burden of proving such a defense lies with the employer. Specifically, the employer must "demonstrate[] that he is unable to reasonably accommodate * * * an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of [his] business." *Ibid.*; see *id.* § 2000e(m) (providing that, as used in Title VII, "[t]he term 'demonstrates' means meets the burdens of production and persuasion"); *Gonzales* v. *O Centro Espirita Beneficente UDV*, 546 U.S. 418, 428 (2006) (construing essentially identical "demonstrate" definition in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2(3)).

B. This Court's only decision applying the "undue hardship" defense is *Hardison*.[12] Hardison, a Sabbath observer, worked in a department that needed to "operate 24 hours per day, 365 days per year." 432 U.S. at 66. Shifts were assigned by a seniority system where employees with more seniority picked their shifts first. *Id.* at 67. Following Hardison's voluntary transfer from one worksite to another, he no longer had enough seniority to avoid Saturday work. *Id.* at 68. This Court rejected Hardison's religious accommodation claim and ruled for the employer, TWA. The Court concluded that each of the accommodations suggested by the court of appeals—which included permitting Hardison to work a four-day week or "carv[ing] out a special exception to its seniority system in order to help Hardison to meet his religious obligations," *id.* at 83—"would have worked an undue hardship on the company." *Id.* at 70. The Court also stated that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 84.

C. The "hardship" ruling in *Hardison* rested on detailed findings of fact about the impact on other workers' seniority rights and the financial costs of premium wages that TWA would have had to pay in order to release Hardison from Saturday work. See 432 U.S. at 78, 84 n.15. In the intervening decades, however, a number of lower courts have taken an extremely undemanding view of the employer's burden with respect to the undue hardship defense.

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[12] Although hardship was argued in *Philbrook*, the Court did not reach the issue, as it held that the accommodation the defendant in that case had afforded might itself satisfy the statutory "reasonable accommodation" obligation. 479 U.S. at 68-69.

Consider, for example, *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004). In that case, the First Circuit sustained an undue hardship defense based on little more than an appeal to the "axiom[] that, for better or for worse, employees reflect on their employers," the court's own conclusion that the employee's "facial jewelry influenced Costco's public image," and the employer's "calculation" that the jewelry "detracted from [Costco's] professionalism." *Id.* at 135. After reviewing other decisions that had "upheld dress code policies," against Title VII claims, the court asserted that "it is not the law that customer preference is an insufficient justification as a matter of law." *Id.* at 136 (internal quotation marks omitted) (quoting *EEOC* v. *Sambo's of Georgia, Inc.*, 530 F. Supp. 86, 91 (N.D. Ga. 1981)).

Other courts have been more willing to hold employers to their statutorily assigned burden of proof. In *EEOC* v. *Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006 (D. Ariz. 2006), for example, the employer claimed it could bar all head coverings for rental counter employees because "any deviation from [Alamo's] carefully cultivated image is a definite burden." *Id.* at 1015 (internal quotation marks omitted). The court granted partial summary judgment for the EEOC, noting that the "record provides no material factual basis for Alamo's conclusions about the cost of 'any deviation' from the uniform policy" and recognizing the employer's assertions to be legally insufficient "speculation." *Ibid.* The decision in *EEOC* v. *Red Robin Gourmet Burgers, Inc.*, No. CO4-1291 JLR, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005), likewise recognized that a proper assertion of undue hardship must be "supported by proof of *actual* imposition on coworkers

or disruption of the work routine," *id.* at *4 (quotation marks and citation omitted; emphasis added), and denied summary judgment on claims that employing a server whose religiously significant tattoos were visible would be "inconsistent with" the company's "image," noting the absence of evidence "that any customers complained about [the employee's] tattoos." *Id.* at *4-*5.

Notably, the district court in this case, in a ruling that the court of appeals was not required to reach, applied a similarly fact-based approach to conclude that respondent's "undue hardship" defense failed. Without questioning respondent's assertions of the significant role its dress and appearance codes generally play in its "brand," the trial court noted that respondent had granted a number of religious accommodations to hijab wearers (and others) in other store locations and had not identified any adverse impact on its business from having done so. See Pet. App. 119a-120a.

D. Regardless of the level of proof required, *amici* have significant concern about courts' readiness to treat employee appearance and "look" requirements as fundamentally similar to employer interests in safety or seniority. As the Court is well aware, "customer preference" justifications have a long—but deservedly unsuccessful—history in American employment discrimination law. An employer's interest in catering to the perceived racial and gender preferences of its customers has been categorically rejected under Title VII. See *Chaney* v. *Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981). As the Fifth Circuit explained in a path-

marking decision rejecting an airline's defense of its women-only flight attendant policy:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Diaz v. *Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

There can be little doubt that similar assertions would be rejected in cases involving discrimination based on national origin or disability. Indeed, it is easy to envision a "Look Policy" aimed at attracting clean-cut "East Coast," "preppy" customers, Pet. App. 3a, that would exclude Mexican-Americans, people who use wheelchairs, and religiously observant Hindus, Sikhs, and Jews.

Whatever the theoretical distinction between a clearly impermissible deference to customer aversion to Hindus, Sikhs, or Jews as such and deference to customer aversion to those who follow these religions' teachings concerning hair, beards, garments, and head coverings, it is unlikely, especially in light of the sometimes intense public prejudice harbored toward members of these groups, that such a rule could be sustained without compromising the core antidiscrimination commitments of Title VII. See

Romtin Parvaresh, Note, *Prayer for Relief: Anti-Muslim Discrimination As Racial Discrimination*, 87 S. Cal. L. Rev. 1287, 1299 (2014) (highlighting similarities between race-based prejudice and present-day bigotry directed at Muslims in the United States); cf. *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615, 617-618 (1987) (holding anti-Semitic vandalism actionable under Reconstruction Era statute "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").[13]

Few courts have grappled with these questions head on. That said, notwithstanding Title VII's prohibition on policies that "limit, segregate, or classify * * * employees * * * because of such individual's * * * religion," 42 U.S.C. § 2000e-2(a)(2), some lower courts have held that relegating members of religious minorities to non-customer contact positions on appearance grounds may constitute a "reasonable accommodation." See Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. Rev. L. & Soc. Change

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[13] Respondent's applying a "look" policy to exclude Ms. Elauf, a "fashion conscious young woman" who shops at respondent's stores and wears its clothing, see Pet. App. 96a, 114a, might, alternatively, be described as expressing an invidious stereotype: that faithful religious women who cover their hair cannot achieve the "look," no matter how closely their attire conforms to respondents' "preppy" and "casual" style. Pet. App. 3a; see *Diaz*, 442 F.2d at 389 ("Of course, Pan Am argues that the customers' preferences are not based on 'stereotyped thinking,' but the ability of women stewardesses to better provide the non- mechanical aspects of the job.").

103, 120-123 (2012) (discussing cases).

When these issues are ripe for this Court's decision, *amici* will urge that, as has been the case in interpreting Title VII's bona fide occupational qualification provisions, courts not treat the costs associated with defying customers' discriminatory tastes as a cognizable "hardship" under *Hardison*. Until then, however, we simply urge that the Court take care to decide this case so as to avoid endorsing the contrary view.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MARC D. STERN
General Counsel
The American Jewish Committee
165 East 56th Street
New York, NY 10022

DAVID T. GOLDBERG
Counsel of Record
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813
david@donahuegoldberg.com

DOUGLAS LAYCOCK
Robert E. Scott
Distinguished Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

TOBY J. HEYTENS
DANIEL R. ORTIZ
University of Virginia School of Law
Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903

DECEMBER 2014

APPENDIX

DESCRIPTION OF *AMICI CURIAE*

The American Jewish Committee **(AJC)**, a global Jewish advocacy organization with over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC has long been a champion of the principle that the failure of a workplace to provide a reasonable accommodation of a religious practice, absent undue hardship, is nothing less than a form of religious discrimination.

The Anti-Defamation League **(ADL)** Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, religious and other forms of prejudice in the United States, ADL is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. This case addresses two of ADL's core priorities: preserving religious freedom and eradicating discrimination.

ADL believes that discrimination against individuals and infringing on individuals' religious freedom are corrosive elements in society that Congress and the states have sought to combat through the establishment of anti-discrimination laws. ADL advocates for the passage, strengthening, and enforcement of laws that aim to eradicate discrimination and laws that protect religious freedom. ADL has also participated in the major Church-State and discrimination cases of the last half-century.

The League remains vitally interested in ensuring that an employee with a legitimate

workplace discrimination claim is afforded the protections long established under Title VII of the Civil Rights Act of 1964.

The Jewish Council for Public Affairs **(JCPA)** is the coordinating body of 17 national Jewish organizations and 125 local Jewish federations and community relations councils. Founded in 1944, the JCPA is dedicated to safeguarding the rights of Jews throughout the world; upholding the safety and security of the State of Israel; and protecting, preserving, and promoting a just, democratic, and pluralistic society. These values motivate JCPA's advocacy. The JCPA is opposed to religious discrimination in all contexts.

The Jewish Social Policy Action Network **(JSPAN)** is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which their participation in the economic and commercial life of their communities was limited.

JSPAN's interest in this case stems directly from the experience of members of the Jewish community, many of whom have faced workplace discrimination stemming from the need to observe traditional religious practices and garb. If the decision of the lower court were to stand, employers could discriminate based upon unfounded perceptions and stereotypes without requiring any form of interactive dialogue. Such a result would undermine the statutory purpose of promoting reasonable accommodations and would deny members of minority faiths equal employment opportunity.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is to protect the rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic governance. Americans United has more than 120,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in many of this Court's leading church-state cases, including cases addressing the availability of religious accommodations. Americans United has long recognized the importance of reasonable accommodations to relieve substantial burdens on religious exercise, so long as those accommodations do not interfere with the rights or benefits of third parties.

The National Center for Lesbian Rights (NCLR) is a national legal advocacy organization for lesbian, gay, bisexual and transgender people, including those who belong to diverse faith communities. NCLR and the communities we represent have a strong interest in ensuring fair and robust protections against employment discrimination on multiple bases, including religion.

Union for Reform Judaism, Central Conference of American Rabbis (CCAR), ***and Women of Reform Judaism*** The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and the

Women of Reform Judaism that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of a commitment to religious freedom. Americans of all faiths must be free to follow the dictates of their conscience when it comes to religious expression.

No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE STATES OF ARIZONA, HAWAI'I, ILLINOIS, MARYLAND, MONTANA, NEW HAMPSHIRE, NEW YORK, OREGON, AND WASHINGTON AS *AMICI CURIAE* SUPPORTING PETITIONER

Thomas C. Horne
Attorney General of Arizona
Robert L. Ellman
Solicitor General
Rose Daly-Rooney*
Chris Carlsen
Assistant Attorneys General
400 West Congress, Bldg. S-315
Tucson, AZ 85701
Phone (520) 628-6756
Rose.Daly-Rooney@azag.gov
**Counsel of Record*

Counsel for Amici Curiae States

(additional counsel listed on signature pages)

Becker Gallagher · Cincinnati, OH Washington, D.C. 800.890.5001

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INTEREST OF *AMICI CURIAE*

Amici Curiae, the States of Arizona, Hawai'i, Illinois, Maryland, Montana, New Hampshire, New York, Oregon, and Washington (the "*Amici* States") have a strong interest in effective enforcement of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, and of state anti-discrimination laws that parallel Title VII. To avoid unnecessary duplication of efforts and provide for the prompt resolution of employment discrimination charges, the EEOC enters into worksharing agreements with state and local agencies. 42 U.S.C. § 2000e-8(b); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 122 (1988) (noting that Title VII supports worksharing agreements to avoid "unnecessary duplication of effort or waste of time"). State and local agencies must meet standards of capability, performance, and compatibility with EEOC's charge processing systems and methods to be designated as Fair Employment Practice Agencies ("FEPAs"). 29 C.F.R. § 1601.70. The EEOC and FEPAs work together to investigate and litigate charges of discrimination.[1]

The Arizona Civil Rights Division ("ACRD"), Hawai'i Department of Labor and Industrial Relations, Montana Human Rights Division, Oregon Bureau of Labor, and Washington Human Rights Commission are designated FEPAs. 29 C.F.R. § 1601.74 (listing designated FEPAs that include forty-six state agencies as well as many city agencies). States that are not

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[1] *See, e.g., Harassment Charges, EEOC and FEPA Combined: FY 1997 - FY 2011*, http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm (last visited Dec. 1, 2014).

designated as a FEPA also have a strong interest because they have standing to sue to enforce Title VII rights on behalf of its citizens under the parens patriae doctrine. *See EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 197-98 (E.D.N.Y. 2003) (In Title VII action involving right of employees to wear dreadlocks for religious reasons, court held that New York Attorney General's Office had standing to sue under Title VII because standing provision evinces intention on part of Congress to allow States to sue in their parens patriae capacity).

The ACRD enforces the Arizona Civil Rights Act ("ACRA"), which has numerous provisions that parallel Title VII provisions. *See* Ariz. Rev. Stat. §§ 41-1461 to 1465. Similar to the provisions of Title VII, under ACRA it is an unlawful employment practice "(t)o fail or refuse to hire or to discharge any individual because of the individual's religion." Ariz. Rev. Stat. § 41-1463(B)(1); *see also* Ariz. Rev. Stat. § 41-1461(13) (defining religion to include religious practices that may be accommodated without undue hardship). Other *Amici* States have laws that parallel Title VII's prohibition against religious discrimination. *See, e.g.*, Mont. Admin. R. 24.9.608 (requiring a reasonable accommodation for religious beliefs and practices); Or. Rev. Stat. Ann. § 659A.033 (making it unlawful to impose an occupational requirement that restricts the ability of an employee to wear religious clothing in accordance with the employee's sincerely held religious beliefs unless it would be pose an undue hardship to accommodate the individual). Although several differences exist, the ACRA is "generally identical" to Title VII, and therefore Title VII case law can be persuasive in interpreting portions of the ACRA. *Bodett*

v. Cox Commc'n Inc., 366 F.3d 736, 742 (9th Cir. 2004) (quoting *Higdon v. Evergreen Int'l Airlines, Inc.*, 673 P.2d 907, 909-10 n.3 (Ariz. 1983)). Therefore, the *Amici* States have an interest in how federal courts interpret similar provisions of state civil rights laws that have not been interpreted by state courts.

Arizona has a particular interest in the resolution of this case because Arizona has a large Native American population,[2] which suffers high levels of unemployment and requires "strong application of antidiscrimination laws" to combat a "painful legacy of discrimination." *Remarks by the President on Economic Mobility*, 2013 WL 6252544 at 5 (Dec. 4, 2013). Further, groups within that population adhere to religious-based grooming customs that may conflict with hair-length and other aesthetic policies similar to Abercrombie's "Look Policy." *See, e.g., A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (affirming district court's decision enjoining school district's requirement that a Native American boy wear his long hair in a bun on top of his head or in a braid tucked into his shirt because it offended a sincerely held religious belief violating the Texas Religious Freedom Restoration Act); *Adakai v. Front Row Seat, Inc.*, 125 F.3d 861 (10th Cir. 1997)

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[2] Arizona, Montana, Oregon and Washington are estimated to be comprised of an "American Indian and Alaska Native" population of 5.3%, 6.5%, 1.8%, and 1.9%, respectively (versus a national average of 1.2%). U.S. Census Bureau, *State and County QuickFacts*, http://quickfacts.census.gov/qfd/states/index.html (last visited Dec. 2, 2014). Hawai'i is estimated to be comprised of a "native Hawaiian and Other Pacific Islander" population of 10%. *Id.*

(affirming jury verdict in favor of Native American plaintiff who was fired because he refused to cut his long hair, which was an integral part of his heritage).

Because the *Amici* States work with the EEOC to eliminate religious discrimination in the workplace and have state provisions that parallel Title VII, the *Amici* States have a compelling interest in having this Court adopt a flexible, workable standard for determining when employers may be liable for failure to provide religious accommodations. The Tenth Circuit's ruling does not provide a workable standard; instead it allows the employer to discriminate when the applicant does not know of an employer's policy and the employer assumes that the applicant's religious beliefs will conflict with its policy.

SUMMARY OF ARGUMENT

A divided panel of the Tenth Circuit incorrectly held that employment applicants are not entitled to a religious accommodation unless they inform the employer that their religious beliefs conflict with the employer's policies, regardless of whether they have knowledge of the employer's policies. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1134-35 (10th Cir. 2013). Relying on cases that did not raise or resolve whether it is the applicant's burden in the first instance to request a religious accommodation to an undisclosed employer policy, the Tenth Circuit's analysis treats applicants and employees as interchangeable despite that applicants do not have access to an employer's policies or the manner in which those policies are applied. In cases where an employer has superior knowledge of a potential conflict between an applicant's religious beliefs and its own undisclosed

policies that will be used to screen an applicant during hiring, an employer should engage in an interactive dialogue with the applicant about whether a reasonable accommodation is possible. By not mentioning the possible conflict and then not hiring the applicant because of it, employers can affirmatively avoid their Title VII obligations to provide a religious accommodation.

In contrast to the Tenth Circuit's inflexible standard, the Ninth Circuit held that an employee was not required to provide his employer with explicit, direct knowledge of the religious nature of the ceremony he wished to attend, because "[a] sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirement." *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993). Under this standard, once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict in order to determine if there is a reasonable accommodation for the job applicant's religious practices. At that point, the need for accommodation has been put on the table for discussion and the employer, with superior knowledge of its ability to accommodate, can no longer ignore the need to initiate dialogue with the employee regarding reasonable accommodations.

The *Heller* standard, unlike the Tenth Circuit's holding, is flexible enough to avoid (1) reflexively granting an employer summary disposition of an

applicant's religious accommodation claim when an employer has superior knowledge of a conflict or potential conflict between the applicant's religious beliefs and its workplace requirements, (2) treating employees and applicants the same despite the asymmetry in information generally available to employees that is not available to applicants, and (3) allowing an employer to escape liability for failing to make a reasonable accommodation simply by refusing to engage in an interactive dialogue with an applicant about a potential conflict.

Contrary to the Tenth Circuit's reasoning, a more flexible notice requirement will not require employers to make assumptions about religion or ask pre-employment inquiries about religious beliefs. Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111 to 12117, provides a model to guide employers in formulating lawful questions during the hiring process about whether applicants can meet job requirements with or without reasonable accommodation and how to avoid improper inquiries and unlawful assumptions.

A flexible rule, as enunciated in *Heller*, would not encumber employers by requiring that they review a laundry list of employment practices with every applicant because, in reality, notice of conflicts between sincerely held religious beliefs and workplace requirements do not often emerge until after employment begins. And the trigger for engaging in an interactive dialogue about reasonable accommodation is not initiated until a potential conflict exists. Employers need only provide sufficient notice of their policies, such as dress and grooming standards, when

employers know or should know that an applicant's religious beliefs will conflict with their policy and use the policy to screen out the applicant.

ARGUMENT

I. The Tenth Circuit's Explicit, Direct Notice Requirement Should Not Apply When the Employer Knows or Should Know There Is a Potential Conflict Between an Applicant's Religious Beliefs and Their Employment Policies.

The Tenth Circuit held that an applicant for employment, Samantha Elauf, was not entitled to protection from religious discrimination because she did not inform the employer that her religious beliefs conflict with the employer's policies, regardless of whether she had knowledge of the employer's policies. *Abercrombie*, 731 F.3d at 1134-35. The Tenth Circuit reached this conclusion by finding that applicants must bear the same prima facie burden for proving religious discrimination as employees, and applicants must "inform (their) employer" of any potential conflict before discrimination can be shown. *Id.* at 1122.

However, as Judge Ebel points out, applicants and employees are not similar because applicants do not have necessarily have access to an employer's policies or the manner in which those policies are applied. *Id.* at 1150 (Ebel, J., concurring in part and dissenting in part). Employees, not applicants, receive employee manuals and training that set out the employer's policies, such as dress and grooming standards, the list of observed holidays, leave policies, break policies, the benefits and privileges of employment, and the internal

grievance procedures for requesting a reasonable accommodation or making a complaint of discrimination. Often, an employer's policies and manuals are proprietary and confidential. Employees, not applicants, have the opportunity to be in the workplace where they can observe whether co-workers have religious decorations in their offices and whether the menu items for company cafeterias or events include options for dietary restrictions related to religious beliefs. Employees, not applicants, are assigned job duties, issued work schedules, and disciplined for failing to satisfy unwritten work requirements.

Here, Abercrombie's "superior knowledge" of their own policies created a situation where Abercrombie was "able affirmatively to avoid its obligation to engage in an interactive dialogue with Elauf about a reasonable accommodation of Elauf's religious practice by not mentioning the possible conflict and then not hiring her because of it." *Id.* Because an applicant necessarily has inferior knowledge of an employer's policies, the Tenth Circuit's prima facie test allows employers to engage in religious discrimination unless the applicant uses the interview as an opportunity to recite a laundry list of the religious practices to which the applicant adheres.[3] Ironically, the Tenth Circuit criticized the EEOC's argument because it determined that Title VII did not require employers to enter the interview "recounting a laundry list of all of the

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[3] This would inject the issue of religion into the hiring decision in cases where there is no conflict or even potential conflict between the employer's policies and the applicant's beliefs.

practices that employees cannot do in the workplace." *Abercrombie*, 731 F.3d at 1130 n.11.

The Tenth Circuit's majority conflates employees and applicants and treats them as interchangeable. By doing this, the majority ascribes a level of knowledge to applicants that is generally available only to employees – who have access to the employer's policies, training in the employer's policies, and specific knowledge of the practical effects of the employer's policies – and then simply assumes that applicants have the same ability as employees to determine whether a conflict exists.

The error of this assumption is borne out by the cases that underpin the prima facie requirement for employees to "inform" the employer of a religious conflict. With one inapposite exception,[4] that requirement arises from a line of cases that only examine the steps that *employees* must take to inform employers of religious conflicts that are apparent to the employee. *See Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977) (determining that an employee "may forego the right to have his beliefs accommodated by his employer" when that employee not only had superior knowledge of the conflict, but was "disinterested in informing his employer of his religious needs" and did "not attempt to accommodate his own beliefs through the means already available to him or cooperate with his employer in its conciliatory efforts"); *see also Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (granting summary judgment to employer on employee's religious

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[4] *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1484 (10th Cir. 1989).

accommodation claim where employer provided numerous reasonable accommodations to address the employee's request for Saturdays off to observe the Sabbath); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026, 1028 (5th Cir. 1984) (concluding there was no clear error in finding that railroad, charged with religious discrimination in employment, made a good-faith effort to accommodate an employee whose Sabbath was from sundown Friday to sundown Saturday and who was discharged when he failed to work during that period); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 147 (5th Cir. 1982) (finding no clear error in determination that employer tried to accommodate employee and requiring the employer to force further shift trades between the staff pharmacists would produce undue hardship); *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 959-60 (8th Cir. 1979) (employer failed to establish that it would have posed an undue hardship to have granted Saturdays off for an employee to observe the Sabbath).

Nor did the courts in *Thomas*, *Turpen*, *Brener*, or *Brown* analyze the notice requirement, because the fact that the employees had provided notice was uncontested in each case. *Thomas*, 225 F.3d at 1153-54 (undisputed that plaintiff-employee had made five specific accommodation requests); *Turpen*, 736 F.2d at 1026 (uncontested that the employee had met his burden of establishing the prima facie case); *Brener*, 671 F.2d at 144 (same); *Brown*, 601 F.2d at 959 (same).

One of the cases underpinning the Tenth Circuit's decision addresses an applicant's religious accommodation claim, but it is inapposite here. *Toledo*, 892 F.2d at 1484. In *Toledo*, the employer, Nobel,

communicated to applicants in both the newspaper advertisements for the position and in information sent to applicants before interviews of its policy not to hire drivers who had used illegal drugs within two years of the date of their application. *Id.* The employer interviewed plaintiff and told him that he had the necessary experience for the job and would be hired if he passed four tests routinely given to all of Nobel's driver applicants, including a polygraph to determine an applicant's truthfulness in responding to questions about past illegal drug use. *Id.* This notice of the employer's policy and pre-employment tests informed the plaintiff of a conflict and triggered the applicant's initiation of the interactive dialogue. *Id.*

In contrast to the *Toledo* facts, here "the EEOC set forth evidence from which a jury could find that Abercrombie refused to hire Elauf, without ever informing her that wearing a hijab conflicted with Abercrombie's Look Policy, in order to avoid having to discuss the possibility of reasonably accommodating Elauf's religious practice." *Abercrombie*, 731 F.3d at 1143 (Ebel, J., concurring in part and dissenting in part). The employer's superior knowledge of a potential conflict that the employer withheld from the applicant is at the heart of this dispute.

Although only *Toledo* states, without analysis, that the prima facie requirement to "inform" is expected of applicants as well as employees, the Tenth Circuit expands the requirement without reflection to encompass applicants, stating that "we are not convinced that we are at liberty to disregard the plain terms of our *Toledo* and *Thomas* decisions, which place the prima facie burden on the plaintiff to establish that

the applicant or employee has initially informed the employer of the conflicting religious practice and the need for an accommodation." *Abercrombie*, 731 F.3d at 1125. Again, this expansion of the prima facie burden placed on employees to applicants is not justified by precedent, and shields employers from liability for discriminatory practices by unrealistically requiring applicants to intuit the manner in which their religious practices may conflict with policies that are not available to them.

The information asymmetry between applicants and employers[5] is best addressed by adopting the flexible notice requirement employed by the Eighth, Ninth, and Eleventh Circuits. *See Brown v. Polk Cnty., Iowa*, 61 F.3d 650, 654 (8th Cir. 1995); *Heller*, 8 F.3d 1433; *Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999). In *Heller*, the Ninth Circuit held that an employee was not required to provide his employer with explicit and direct knowledge of the religious nature of the ceremony he wished to attend, because "[a] sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirement." *Heller*, 8 F.3d. at 1439.

Although *Heller* did not raise or resolve whether it is the applicant's burden in the first instance to request

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[5] Except where employers provide notice of the selection criteria or test that will be applied to eliminate prospective applicants. *See, e.g., Toledo*, 892 F.2d at 1484.

a religious accommodation to an undisclosed employer policy used as a selection criteria, the *Heller* standard, unlike the Tenth Circuit standard, is flexible enough to avoid (1) reflexively granting an employer summary disposition of an applicant's religious accommodation claim when an employer has superior knowledge of a conflict or potential conflict between the applicant's religious beliefs and its workplace requirements, (2) treating employees and applicants the same despite the asymmetry in information generally available to employees that is not available to applicants, and (3) allowing an employer to escape liability by failing to engage in the interactive dialogue with an applicant about a perceived religious conflict.[6] As the dissent noted below, the principles enunciated in the Ninth

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[6] Although typically the burden is on the employee to initiate the interactive process, courts have recognized that employees may proceed when their employers have essentially foreclosed the interactive process through their policies or actions because "[n]either party may create or destroy liability by causing a breakdown of the interactive process." *Albert v. Smith's Food & Drug Centers, Inc.*, 356 F.3d 1242, 1253 (10th Cir. 2004); accord *Davoll v. Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999) (allowing employees to rely on the futile gesture doctrine where their employer's policy against transferring to Career Services positions foreclosed reassignment, the only reasonable accommodation that could have assisted plaintiffs); *Bultemeyer v. Fort Wayne Community Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (excusing mentally ill employee from requesting reasonable accommodation because "he may have thought it was futile to ask, after [his employer] told him he would not receive any more special treatment").

Circuit's decisions in *Heller* and *Brown v. Lucky Stores, Inc.*[7] permit the following analysis:

> To my mind, once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict in order to determine if there is a reasonable accommodation for the job applicant's religious practices. At that point, the need for accommodation has been put on the table for discussion and the employer, with superior knowledge of its ability to accommodate, can no longer ignore the need to initiate dialogue with the employee regarding reasonable accommodations.

Abercrombie, 731 F.3d at 1149 (Ebel, J., concurring in part and dissenting in part).

II. Contrary to the Tenth Circuit's Holding, a More Flexible Notice Requirement Will Not Require Employers to Make Assumptions About Religion or Ask Applicants Prohibited Pre-Employment Questions about Religious Beliefs and Practices.

The Tenth Circuit justified its requirement that Elauf provide explicit, direct notice of a conflict

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[7] *Lucky Stores, Inc*, 246 F.3d 1182, 1188 (9th Cir. 2001) (recognizing an exception to the requirement that the employee request an accommodation in an ADA case where the employer knows that the employee has a disability, knows that the employee is having trouble at work due to his disability, and knows, or has reason to know, that the disability prevents the employee from requesting an accommodation).

between a religious practice and Abercrombie's Look Policy by noting that:

> [u]nder Title VII an employer is affirmatively discouraged from asking applicants or employees whether their seemingly conflicting practice is based on religious beliefs, and, if so, whether they actually will need an accommodation for the practice, because it is inflexible (i.e., truly conflicting), and the employer also is discouraged by the EEOC from speculating about such matters.

Abercrombie, 731 F.3d at 1134-35. Under those circumstances, the Tenth Circuit concluded "the interactive accommodation process ordinarily only can be triggered when applicants. first provide the requisite information to the employer." *Id.* at 1135. But the employer may and should ask certain questions when it knows there may be a conflict between an applicant's religious practice and the employer's policy.

There are several manners in which employers may lawfully inquire about the need for religious accommodations. Although the EEOC discourages employers from inquiring as to job applicants' religious beliefs as a general matter, after an employer has received sufficient information about an applicant's beliefs to be on notice of a potential religious conflict, the EEOC does not discourage employers from making limited inquiries to confirm the need for an accommodation. *See* Petitioner's Brief at 30 (citations omitted). To do so, an employer who suspects a possible religious conflict can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would have difficulty

complying. *Id.* (citing *EEOC's Best Practices for Eradicating Religious Discrimination in the Workplace*, available at http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited Dec. 2, 2014)). Therefore, concern about the prospect of routine inquiry into religious beliefs does not support limiting Title VII protections.

However, employers concerned about introducing the discussion of religious accommodation during the interview have the option of reserving the discussion for after a job offer is made. Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111 to 12117, shows that asking a question about whether a prospective applicant can meet dressing and grooming standards with or without a reasonable religious accommodation, in this case, would have been an acceptable inquiry, would have avoided the unlawful assumption that Abercrombie made,[8] and would have ultimately led to a post-job-offer discussion about whether the Look Policy posed a conflict to Elauf's sincerely held religious belief.[9]

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[8] The EEOC put forth evidence establishing that "Abercrombie assumed that Elauf was Muslim, that she wore a hijab for religious reasons, and that she would insist on wearing a hijab while working in an Abercrombie store, and then refused to hire Elauf because she wore a hijab." *Abercrombie*, 731 F.3d at 1150 (Ebel, J., concurring in part and dissenting in part).

[9] The Tenth Circuit's standard prevents inquiry into whether Abercrombie's Look Policy regarding caps is a legitimate job requirement and if so, whether an employee wearing a hijab, turban, or yarmulke for religious purposes could model Abercrombie's "classic East Coast collegiate" aesthetic with that addition to the "look."

Under Title VII, Title I of the ADA expressly prohibits a covered entity from making inquiries of job applicants about the existence, nature, or severity of a disability, employers may lawfully inquire into the ability of an applicant to perform job-related functions. *See* 42 U.S.C. §§ 12112(d)(2)(A)-(B). The EEOC's ADA regulations clarify that lawful pre-employment inquiries include asking applicants how they would perform job-related functions with or without reasonable accommodation. 29 C.F.R. § 1630.14(a). Further, the EEOC provides precise written guidance under the ADA on how to formulate inquiries regarding reasonable accommodation that can defer the discussion until after a job offer and be applied to religious accommodations:

> May an employer ask whether an applicant can perform the job?
>
> Yes. An employer may ask whether applicants can perform any or all job functions, including whether applicants can perform job functions "with or without reasonable accommodation."
>
> May an employer ask applicants whether they will need reasonable accommodation to perform the functions of the job? In general, an employer may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation for a job. This is because these questions are likely to elicit whether the applicant has a disability (generally, only people who have

> disabilities will need reasonable accommodations).
>
> Example: An employment application may not ask, "Do you need reasonable accommodation to perform this job?"
>
> Example: An employment application may not ask, "Can you do these functions with ___ without ___ reasonable accommodation? (Check One)"

EEOC No. 915.200, *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (1995), available at http://www.eeoc.gov/policy/docs/preemp.html (last visited Dec. 2, 2014). Therefore, accommodation may be discussed during the interview when there is notice of a potential conflict or after a job offer and before the applicants begin employment.

The EEOC's Title VII regulations regarding religious discrimination are consistent with its regulations and guidance regarding ADA accommodations. An employer may not base its decision whether to hire an applicant on the applicant's need for a religious accommodation unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship. 29 C.F.R. § 1605.3(b)(1). In the closely analogous example, the EEOC clarifies that to determine a prospective employee's availability-for-work during the weekends, an employer is limited to inquiries that either do not have the effect of excluding

employees who need a religious accommodation or are justified by business necessity. *See* 29 C.F.R. § 1605.3(b)(2).

An example of a permissible practice is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine whether an accommodation is possible. *Id.* The same practice can be used to address dress and grooming standards, such as those included in Abercrombie's Look Policy. The employer may provide a copy of the dress and grooming standards to the applicant and inquire whether a prospective applicant can meet dressing and grooming standards with or without a reasonable religious accommodation.

Thus, when Elauf appeared at the interview for a position at Abercrombie wearing a black hijab, the assistant manager who interviewed her could have provided her with a copy of the Look Policy[10] (or alternatively, could have described the Look Policy to

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[10] Employers are encouraged to share dress and grooming standards with applicants as one of several recommendations to prevent Title VII violations. *See, e.g., Dress Codes: Tips on Adopting and Enforcing Dress Policies*, Richards, Watson, and Gershon—Attorneys at Law Employment and Labor Newsletter, available at http://www.rwglaw.com/pdf/Dress Code.pdf (last visited Dec. 1, 2014).

her) and either asked (1) whether and why Elauf would have difficulty complying with the policy, or (2) whether Elauf could adhere to the Look Policy with or without a reasonable religious accommodation. If the latter approach was used, whether or not Elauf needed a reasonable accommodation for the hijab, her answer would have likely been "yes." Assuming Abercrombie's offer, Elauf could have asked for an exception to the Look Policy because she wore the hijab for religious reasons. If there were any questions as to whether to grant the reasonable accommodation request, the interviewer could have referred the question to the corporate office as Abercrombie stated is its policy.

Then, for those employers who prefer to keep religion out of the hiring discussion, whether a reasonable accommodation is lawfully required would be considered separate from the hiring process. Even if upon being asked whether she could meet the Look Policy, or if Elauf had volunteered that she wanted to wear her hijab to work for religious reasons, the EEOC's regulation contemplates that the issue of reasonable accommodation may arise during the hiring process without resulting in a violation.[11]

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[11] The EEOC Title VII religious discrimination regulation states that the "use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on employment opportunities of persons with certain religious practices" and therefore "the use of such inquiries will be considered to violate Title VII." *See* 29 C.F.R. § 1605.3(b)(2). However, the regulation also allows an employer to overcome the presumption of a violation under certain circumstances. 29 C.F.R. §§ 1605.3(b)(2)(i)-(ii) (allowing employer to disprove a violation by showing either that the inquiries (1) "did not have an exclusionary effect on its .

The Tenth Circuit states that applicants must provide explicit, direct notice of a reasonable accommodation request under Title VII because, in part, "an employer is not legally obligated under Title VII to prompt applicants to deliver notice of the need for a religious accommodation, by initially recounting a laundry list of all of the practices that employees cannot do in the workplace." *Abercrombie*, 731 F.3d at 1130 n.11. As a practical matter, a flexible rule, as enunciated in *Heller*, would not encumber employers by requiring that they review a laundry list of employment practices with every applicant because, in reality, notice of conflicts between sincerely held religious beliefs and workplace requirements do not often emerge until after employment begins. And the trigger for engaging in an interactive dialogue about reasonable accommodation is not initiated until a potential conflict exists. As the following list of religious accommodations reflects, most religious accommodations apply to employees rather than applicants:

- "tak[ing] into account the different religious beliefs of *employees* when planning holiday-related events,"[12]

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prospective employees needing an accommodation for the same religious practices" or (2) "w[ere] otherwise justified by business necessity").

[12] Society for Human Resource Management, *Survey Report—Religion and Corporate Culture: Accommodating Religious Diversity in the Workplace* (2008) at 7 (emphasis added), available at http://www.shrm.org/research/Surveyfindings/articles/pages/religionandcorporateculture.aspx (last visited Dec. 2, 2014) ("SHRM 2008 Survey Report").

- "allow[ing] religious decoration of [employee] workspace within one's office or cubicle,"[13]
- "allow[ing] flexible scheduling to accommodate *employees'* religious practices at work (e.g. meditating, praying, worshiping, etc.),"[14]
- "tak[ing] into account *employees'* various religious holidays when planning work-related events (e.g. conferences, meetings, trainings, trips, workshops, etc.),"[15]
- "offer[ing] variety of food in organization's cafeteria/eatery, meetings, etc. (e.g. halal, kosher, vegetarian, etc.),"[16]
- "mak[ing] dress code and/or personal appearance code exemptions/modifications,"[17]
- "creat[ing] designated areas for *employees* to use for religious practices (e.g. meditation room, prayer room, etc.),"[18]

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[13] *Id.*

[14] *Id.* (emphasis added).

[15] *Id.* (emphasis added).

[16] *Id.*; *see also* 29 C.F.R. § 1605.2, App. A (summarizing findings during the Commission's Hearing on Religious Discrimination about religious practices requiring accommodation and listing "following certain dietary restrictions").

[17] SHRM 2008 Survey Report, at 7; *see also* 29 C.F.R. § 1605.2, App. A (listing "dress and other personal grooming habits" as religious practices requiring accommodation).

[18] SHRM 2008 Survey Report, at 7 (emphasis added); *see also* 29 C.F.R. § 1605.2, App. A (listing "need for prayer break during work hours" as a religious practice requiring accommodation).

- "allow[ing] religious decoration of [employee] workspace (within one's office/cubicle) during religious holidays only,"[19]
- "allow[ing] on-site religion-based affinity groups,"[20]
- allowing sufficient leave for an employee during a mourning period for a deceased relative,[21]
- allowing an exemption to a medical examination requirement,[22]
- flexible scheduling for observance of Sabbath or religious holidays,[23] and
- excusing employees from performing duties that conflict with religious beliefs.[24]

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[19] SHRM 2008 Survey Report, at 7.

[20] *Id.*

[21] 29 C.F.R. § 1605.2, App. A (listing "not working during a mourning period for a deceased relative" as a religious practice requiring accommodation).

[22] *Id.* (listing "prohibition of medical examinations" as a religious practice requiring accommodation).

[23] *Id.* (listing "observance of the Sabbath or religious holidays" as religious practices requiring accommodation).

[24] *See, e.g., Noesen v. Med. Staffing Network, Inc.*, 2007 WL 1302118 (7th Cir. May 2, 2007) (pharmacy reasonably accommodated Catholic pharmacist by allowing him to transfer any customer service involving contraceptives and relieving him of all telephone and counter duties would have posed undue hardship).

Even dress and grooming standards and availability for work do not present required items on a laundry list of workplace rules that an employer must review with applicants, unless an employer intends to apply the requirements as a selection criterion without providing any notice to applicants that they are being evaluated on the basis of the criteria, as Abercrombie did in this case. Here, Abercrombie need only mention a single item—the Look Policy—not because it was on a laundry list of its job expectations for employees, but because it chose to apply the Look Policy's reference against "caps" and wearing black to reject Elauf, unbeknownst to her, and thereby deprive her of the opportunity to ask for a religious accommodation.

This stands in stark contrast to *Toledo*, where the employer communicated its policy to the applicant of not hiring applicants who had used illegal drugs in the two years prior to their application and informed him that he would be hired subject to passing several tests, including a polygraph test to evaluate the truthfulness of his responses related to past drug use. *Toledo*, 892 F.2d at 1484. This notice of the pre-selection tests and requirements prompted the applicant to initiate a dialogue about his membership in the Native American Church and use of peyote as part of church ceremonies. *Id.*

Similarly, an employer's notice to prospective applicants that they had been scheduled to take a required pre-employment test would prompt an applicant to engage in a dialogue with the employer if the date of the test fell on a religious holiday or Sabbath. *See* 29 C.F.R. § 1605.3(a) (requiring covered entities to reschedule a selection test when applicants

cannot attend because of their religious practices unless undue hardship would result).

In those limited circumstances when a conflict between a sincerely held religious belief and an employer's policy arises before a job offer and there has been a breakdown in the use of the interactive process to resolve the conflict, the rule in *Heller* is flexible enough to address whether the applicant or employer is responsible for that breakdown. Under *Heller's* flexible rule, courts are better equipped to reach appropriate results when different circumstances require, such as when an employer, as in *Toledo*, provides notice of a selection criterion to the applicant, versus an employer such as Abercrombie, which failed to inform Elauf of their Look Policy, but assumed that she was Muslim, wore the hijab for religious reasons, and did not select her because she wore the hijab to the job interview.

If the *Heller* rule is adopted, employers will be encouraged to participate in the interactive dialogue to resolve reasonable accommodation issues on the merits. Only then can unresolved disputes between applicants and employers be decided, not on the basis of asymmetry in information, but on whether there is a reasonable accommodation that does not require an applicant to choose between an employment opportunity and following a sincerely held religious belief without undue hardship to the employer.

CONCLUSION

This Court should reverse the Tenth Circuit's decision.

Respectfully submitted,

THOMAS C. HORNE
Attorney General of Arizona
Robert C. Ellman
Solicitor General
Rose A. Daly-Rooney*
Chris Carlsen
Assistant Attorneys General
400 W. Congress, Suite S-315
Tucson, AZ 85701
(520) 628-6756
Rose.Daly-Rooney@azag.gov
**Counsel of Record*

Counsel for Amici Curiae States

RUSSELL A. SUZUKI
Attorney General of Hawai'i
425 Queen Street
Honolulu, Hawai'i 96813
(808) 586-1500

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2464

DOUGLAS F. GANSLER
Attorney General
State of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

TIMOTHY C. FOX
Attorney General
Dale Schowengerdt
Solicitor General
State of Montana
P.O. Box 201401
Helena, MT 59620
(406)444-2026

JOSEPH A. FOSTER
Attorney General
State of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
120 Broadway, 25th Floor
New York, NY 10271

ELLEN F ROSENBLUM
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301
(503)378-4400

ROBERT W. FERGUSON
Attorney General of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
(360)753-6200

December 10, 2014

No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

ERIC S. BAXTER
Counsel of Record
ERIC C. RASSBACH
ASMA T. UDDIN
DIANA M. VERM
The Becket Fund
for Religious Liberty
1200 New Hampshire Ave.
NW, Ste. 700
Washington, DC 20036
ebaxter@becketfund.org
(202) 955-0095
Counsel for *Amicus Curiae*

QUESTION PRESENTED

Whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

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12 *Journals of the Continental Congress* (Worthington Chauncey Ford ed., 1908) (Oct. 1778) 15

Alexis de Tocqueville, I *Democracy in America* (Henry Reeve trans., 1899) (1835) 16

EEOC, *Compliance Manual, Section 12: Religious Discrimination* § 12-IV Overview (2008) 6

Frank Newport, "Mississippi Most Religious State, Vermont Least Religious." (Feb. 3, 2014), *available at* http://www.gallup.com/poll/167267/mississippi-religious-vermont-least-religious-state.aspx 11, 12

Frank Newport, "State of States: Importance of Religion" (Jan. 28, 2009), *available at* http://www.gallup.com/poll/114022/state-states-importance-religion.aspx 12

Gallup, Religion (2013), *available at* http://www.gallup.com/poll/1690/religion.aspx 11

Homo Religiosus? Debating the Naturalness of Religion and the Anthropological Foundations of Religious Freedom (Timothy Samuel Shah, ed.) (forthcoming 2016) 9, 10, 15

Letter from Benjamin Franklin to the Abbés Chalut and Arnaud (April 17, 1787) *in* 9 *The Writings of Benjamin Franklin*, at 569 (Albert Henry Smyth ed. 1906) 15

Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 Works of John Adams, at 229 (Charles Francis Adams ed. 1854) 16

Pew Forum on Religion and Public Life, The Global Religious Landscape (2010), *available at* http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/ 11

Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey (Feb. 2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf 11

Steve Crabtree, "Religiosity Highest in World's Poorest Nations." (August 31, 2010), *available at* http://www.gallup.com/poll/142727/religiosity-highest-world-poorest-nations.aspx 11

Tanenbaum, What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion (Mar. 2013), *available at* https://tanenbaum.org/publications/2013-survey/ 12

The International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) 14

U.S. Equal Employment Opportunity Commission. Religion-Based Charges, FY 1997 – FY 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm 13

INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest law firm that protects the free exercise of religion by persons of all faiths. Agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, Zoroastrians, and many others have all been defended by the Becket Fund in lawsuits ranging across the country and around the world.

The Becket Fund's representation of this broad array of religious believers is fueled by its belief that the religious impulse is inherent in all human beings and that religious expression is natural and inevitable in all aspects of human life. Thus, preserving a broad right for all sincere believers to freely exercise their religion—in private and in public—is essential to upholding both individual human dignity and the moral foundations that support a free society.

In pursuit of this mission, the Becket Fund has defended—both as primary counsel and as *amicus curiae*—the free exercise of religion within the ministry, *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694 (2012); in the workplace, *Burwell* v. *Hobby Lobby*, 134 S. Ct. 2751 (2014); in prison, *Holt* v. *Hobbs*, No. 13-6827 (argued Oct. 7, 2014); in public places, *Tong* v. *Chicago Park Dist.*, 316 F. Supp. 2d 645 (N.D. Ill. 2014); in schools, *Hood* v. *Oliva*, 226 F.3d 198 (3d Cir. 2000); in the military,

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[1] No party's counsel authored any part of this brief. No person other than the *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

Rigdon v. *Perry*, 962 F. Supp. 150 (D.D.C. 1997); and in numerous other public and private settings.

Here, the Becket Fund is concerned that the Tenth Circuit's decision creates an opening for blatant religious discrimination in employment and unnecessarily penalizes religious exercise in the workplace, even where it would have no meaningful impact on an employer's business. The ruling below contributes to the marginalization of religion in public life by imposing a presumption that employees are nonreligious unless they explicitly announce otherwise, essentially creating a standard of "protection upon request only" that erodes the important role that religion plays in society.

SUMMARY OF THE ARGUMENT

This case is about the baseline assumptions the law applies to members of our society. When an American approaches her employer, her government, or her fellow citizens for accommodation or for redress, does the law assume, as Jean-Jacques Rousseau might have, that she is a blank slate? Or does the law presume that Americans have human qualities: family relationships, mental and physical abilities, personality, cultural attachments, and as in this case, religious belief? It is simple anthropological fact that most human beings have religious beliefs and a religious identity of one sort or the other. It is also simple fact that human beings carry that identity with them into the workplace. If the law is to properly order human relationships, it must take those facts into account. The law may not assume that people are irreligious unless proven otherwise, and it should not assume that the workplace is a religion-free zone.

Yet that is precisely what the Tenth Circuit would have federal courts do. Unless an employee makes a formal declaration of her religious affiliation or exercise, the employer can assume a lack of religious identity and draw a stark line between religious activity and commercial activity. This is wrong in at least three respects. First, it elevates form over substance, allowing employers to disregard obvious evidence of religious exercise in the workplace and thereby evade their Title VII obligation to provide reasonable accommodation. Second, as noted above, the Court's reasoning adopts an erroneous assumption that employees are nonreligious unless they prove otherwise, ignoring the reality of the human condition. Third, the Court's analysis contravenes basic principles of law and political philosophy that undergird our entire system of free governance, contributing to the marginalization of religion in public life.

In issuing its ruling, this Court should reject the Tenth Circuit's false assumptions and construe Title VII in a manner that recognizes the religious nature of human beings and the important role that religion plays in society, including the workplace.

BACKGROUND

This case includes evidence that Respondent Abercrombie & Fitch Stores, Inc. violated Title VII of the Civil Rights Act of 1964 by blatantly discriminating against Samantha Elauf because of her religion. Elauf is Muslim and, whenever in public, wears a headscarf as a "reminder of her faith" and as a religious expression of modesty. Pet. App. 95a. Title VII requires relatively little of employers confronted with employees wishing to engage in religious exercise. Employers may not treat employees differently because of their

religion, 42 U.S.C. § 2000e-2 (a)(1), and they must "reasonably accommodate" the religious exercise, although only if accommodation can be made without "undue hardship" to the business, 42 U.S.C. § 2000e(j).

Abercrombie's business is selling clothes, and in their own attire, Abercrombie's floor employees are asked to "model" the company's "look." Pet. App. 97a. Among other things, this "Look Policy" forbids Abercrombie's "models" from wearing hats. Pet. App. 99a. But the hat policy has exceptions. Indeed, since 2001, exceptions for religious headscarves have been made by Abercrombie at least eight or nine times in different parts of the country. Pet. App. 104a. Yet Abercrombie purposely refused to consider a similar accommodation for Elauf.

When Elauf applied for the job as a floor model, she was interviewed by the store's assistant manager, Heather Cooke. Cooke "believed Elauf was a good candidate for the job" and, on her original "rating sheet," gave an interview score that would have resulted in Elauf being hired. Pet. App. 98a, 101a. Cooke delayed the hiring only because she was uncertain whether Elauf's headscarf violated the Look Policy. The store's head manager was also uncertain, so Cooke approached her District Manager, Randall Johnson.

According to Cooke, Johnson told her "that employees were not allowed to wear hats at work, and that if Elauf wore the headscarf, then other associates would think they could wear hats at work" as well. Pet. App. 99a. When Cooke explained her belief that Elauf wore the scarf for religious reasons, Johnson was scornfully indifferent: "'[S]omeone can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them.'" *Ibid.* When Cooke

responded that Elauf was probably "Muslim, and that [Islam] was a recognized religion," Johnson still insisted that Elauf could not be hired.[2] Pet. App. 100a. Following this consultation with Johnson, Cooke threw out her original rating sheet and filled out a new form so it appeared that Elauf was not qualified for the job. Pet. App. 102a.

"Those facts, if found by a jury, smack of exactly the religious discrimination that Title VII prohibits." Pet. App. 87a (Ebel, J., dissenting in part). Although Abercrombie's managers knew that Elauf was likely Muslim and assumed that Elauf wore the headscarf for religious reasons, they chose to alter her interview scores rather than accommodate her religion, even though other stores had made numerous exceptions, apparently with no "undue hardship" on Abercrombie's business. And Johnson's "paint themselves green" comment further exhibited animosity toward religious accommodations, implicitly castigating religious employees as erratic and unprincipled.

Yet despite this evidence of discrimination, the Tenth Circuit ruled against Elauf on a technicality. Because Elauf never "explicitly" stated the headscarf was religious and never "explicitly" claimed that her religion forbade her from removing it to comply with Abercrombie's policy, the Court held that she could not prevail on her claims of religious discrimination. Pet. App. 72a.

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[2] Randolph later testified he was aware at the time that "some Muslim women wear head scarves," and he agreed that "[Elauf] would have been a good candidate to hire * * * except for the head scarf." Pet. App. 101a.

ARGUMENT

I. The Tenth Circuit's Ruling Gives Shelter to Blatant Religious Discrimination.

Although Title VII does not expressly include a "notice" requirement, courts impose the common-sense requirement that an employer cannot be liable for failing to accommodate an employee's religious exercise of which it is unaware. See, *e.g.*, *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010) (listing requirements of prima facie Title VII case); see also EEOC, *Compliance Manual, Section 12: Religious Discrimination* § 12-IV Overview (2008) (imposing notice requirement). The Tenth Circuit's exceedingly formalistic interpretation of that notice requirement, however, imposes an unreasonably strict standard on employees—especially new applicants—and unnecessarily gives employers room to engage in blatant religious discrimination.

In a series of pronouncements, the Tenth Circuit's opinion successively narrows the protection that Title VII affords religious employees. First, despite Abercrombie's actual knowledge that Elauf was *probably* wearing the headscarf for religious reasons, the Tenth Circuit held that Abercrombie had no duty to accommodate her because she herself had never "explicit[ly]" told Cooke that the headscarf was a religious article. Pet. App. 29a ("[O]rdinarily the applicant or employee must initially provide the employer with *explicit* notice of the conflicting religious practice and the need for an accommodation for it." (emphasis added)). According to the court, notice through observation is insufficient, it must be explicit, with the employee as the direct source. Pet. App. 46a.

Second, the court held that even if notice could be satisfied through an employer's observation or from a source other than the employee, Elauf still would not prevail. Pet. App. 39a. "That is because such notice would need to be based on the employer's particularized, *actual* knowledge of the key facts that trigger its duty to accommodate." *Ibid.* In other words, although Cooke had significant reason to *believe* Elauf was Muslim and wore the headscarf for religious reasons,[3] the court concluded that belief alone is insufficient to trigger Title VII's protections. The notice must be certain.

And in a final narrowing of the Title VII right, the court held that even certain notice of a religious conflict, explicitly from the employee, would be insufficient unless the employee also confirmed that the religious exercise was "inflexible" and could not be set aside for purposes of employment. Pet. App. 23a.

The facts of this case alone are sufficient to show that the Tenth Circuit's restrictive ruling unnecessarily burdens employees in a manner that creates opportunities for employers to evade responsibility for blatant discrimination. Here, Elauf simply did not know—and, as a new job applicant, had no real way to know—that Abercrombie's "Look Policy" prohibited headwear. Pet. App. 97a. The Tenth Circuit's ruling thus deprived her of Title VII's protections through no fault of her own.

Cooke and Johnson, on the other hand, both knew that Elauf's headscarf was technically a violation of

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[3] Cooke's belief was based on her having observed Elauf regularly wearing the scarf. Pet. App. 98a. Cooke was also aware that Elauf was close friends with another Abercrombie employee who Cooke knew to be Muslim. Pet. App. 7a.

company policy and that Elauf was probably wearing it for a religious purpose. In that circumstance, there is no reason why Abercrombie should have been excused from its minimal duty under Title VII not to engage in religious discrimination, even if it was not entirely certain about Elauf's beliefs. Yet the Tenth Circuit's ruling callously ignored that Elauf would have been hired but for Johnson's apparent antipathy toward religious exercise in the workplace.

Of course, a plaintiff must show that her employer has some level of notice, but *any* notice of a potential religious conflict should trigger the employer's duty not to discriminate on religious grounds. The Tenth Circuit's hypertechnical requirement that notice counts only if it comes directly from the employee and explicitly identifies an inflexible religious exercise serves no purpose other than to irrationally limit the scope of Title VII's protections.

The Tenth Circuit's repeated concern that employers would have to respond to more ambiguous indicia of religion by prying into their employees' religious beliefs, see Pet. App. 24a, 41a-42a, 53a-54a, is entirely unfounded. If an employer perceives a potential conflict, it would merely need to identify the work requirement for the employee and inquire whether the employee could satisfy it. In contrast, under the Tenth Circuit's ruling, employers could limit access to information and use evasion or even intimidation to prevent or discourage employees from communicating sufficiently to meet the Tenth Circuit's heightened notice standard, even when the employer already has sufficient notice of the religious conflict.

Nor is the Tenth Circuit's ruling limited to the context of religious discrimination. A female job applicant

who appeared to be expecting a child but had not expressly stated that fact could be dismissed simply because the employer feared she might be pregnant and thus unable to perform certain job duties without accommodation. Cf. *Young* v. *United Parcel Service, Inc.*, No. 12-1226 (argued Dec. 3, 2014) (considering work accommodations for pregnant employees). Similarly, individuals with obvious disabilities could be subjected to discrimination without recourse, if the employer simply showed that the applicant had failed to explicitly identify the disability.

As relevant here, the purpose of Title VII is to prevent religious discrimination. The Tenth Circuit's ruling has the opposite effect by potentially shielding employers from liability even for blatant discrimination.

II. The Tenth Circuit's Ruling Ignores the Reality of the Human Condition.

The Tenth Circuit's ruling essentially adopts a presumption that employees are not religious unless they affirmatively and verbally prove otherwise. But this presumption has it exactly backwards: Americans—indeed, *humans*—are overwhelmingly religious.

Religion is not only "primordial in human history and present in * * * all human civilizations," but has also proven "to be incredibly resilient, incapable perhaps of being destroyed or terminated," even by powerful states determined to extinguish it.[4] It is "irre-

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[4] *Homo Religiosus? Debating the Naturalness of Religion and the Anthropological Foundations of Religious Freedom* (Timothy Samuel Shah, ed.) (forthcoming 2016) (manuscript at 24, on file with authors and *amicus*) (*Homo Religiosus*).

pressible, widespread, and seemingly inextinguishable," at least in part, because human beings have "'innate features'" and exist in an environment that "'predispose and direct them toward religion.'"[5]

For example, almost all human knowledge is ultimately founded on belief. "In the end, none of us can find and build upon certain, indubitable truths that are not dependent upon more basic, presupposed beliefs."[6] This "*epistemic condition*," in which "[r]eligious believing is * * * not at odds or variance with the * * * trajectory of all human believing" "helps tend people * * * toward religion."[7] Our "*existential condition* also lends itself to the tendency toward religious engagement," imposing questions about the source and meaning of life.[8] And our "*moral condition*"—the "inescapabl[e]" need for making "'strong evaluations'" with significant consequences—also pushes us to seek a higher source of ultimate right and wrong.[9]

It is no surprise then that eight out of ten people across the world identify with a particular religion. According to studies, 84% of the global population is not

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[5] *Id.* (manuscript at 42-43, 9).

[6] *Id.* (manuscript at 31).

[7] *Ibid.*

[8] *Id.* (manuscript at 32).

[9] *Ibid.*

only religiously affiliated,[10] but also considers "religion an important part of their daily lives."[11]

America is no exception. 84% of Americans have a religious affiliation.[12] And they hold their religious beliefs strongly. In a 2013 study conducted by Gallup, respondents were asked, "How important would you say religion is in your own life?" 56% said "very important" and 22% said "fairly important."[13] Around 57% of Americans "say that religion can answer all or most of today's problems."[14]

America's religiosity is also increasing. Between 2008 and 2013, there was an increase in the percent-

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[10] Pew Forum on Religion and Public Life, The Global Religious Landscape (2010), *available at* http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/ (last viewed Dec. 9, 2014).

[11] Steve Crabtree, "Religiosity Highest in World's Poorest Nations." (August 31, 2010), *available at* http://www.gallup.com/poll/142727/religiosity-highest-world-poorest-nations.aspx (last viewed Dec. 9, 2014).

[12] Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey (Feb. 2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (last viewed Dec. 9, 2014).

[13] Gallup, Religion (2013), *available at* http://www.gallup.com/poll/1690/religion.aspx (last viewed Dec. 9, 2014).

[14] Frank Newport, "Majority Still Says Religion Can Answer Today's Problems." (June 27, 2014), *available at* http://www.gallup.com/poll/171998/majority-says-religion-answer-today-problems.aspx (last viewed Dec. 9, 2014).

age of Americans who are very or somewhat religious.[15] The number of "very religious" Americans rose in almost every state.[16] And Oklahoma, where Abercrombie engaged in the blatant religious discrimination at issue here, tops the charts: Oklahoma is one of the top 10 most religious states in the country, with 75% of respondents stating that religion is an important part of their daily life.[17]

The studies are clear: a majority of Americans say that not only is religion important, but also that it is intertwined in their daily life, including their work. They conclude that "religion is relevant in the workplace" and that religious accommodation results in "improved morale."[18] "People of all faiths * * * have religious needs that require a response in the workplace," and they regularly seek accommodations for a variety of religious practices, such as "wearing facial hair or clothing that is part of their religious identity," and not working on "Sabbath observances or a religious holiday."[19] Thousands of employees bring claims

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[15] Frank Newport, "Mississippi Most Religious State, Vermont Least Religious." (Feb. 3, 2014), *available at* http://www.gallup.com/poll/167267/mississippi-religious-vermont-least-religious-state.aspx (last viewed Dec. 9, 2014).

[16] *Ibid.*

[17] Frank Newport, "State of States: Importance of Religion" (Jan. 28, 2009), *available at* http://www.gallup.com/poll/114022/state-states-importance-religion.aspx (last viewed Dec. 9, 2014).

[18] Tanenbaum, What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion (Mar. 2013), *available at* https://tanenbaum.org/publications/2013-survey/ (last viewed Dec. 9, 2014).

[19] *Ibid.*

each year; in 2013 alone, $11.2 million in monetary benefits were paid in religious discrimination cases.[20]

These statistics show that it is only fair to deem the notice requirement satisfied when an employer has *actual knowledge*, even if it is just actual knowledge of a *potential* religious requirement. Americans are religious, and they seek to carry out their religion in their daily lives, including their work. Employers should expect to encounter religion in their workplaces, and the law should not allow them to conduct real discrimination against employees with real religious requirements simply by claiming they weren't certain that religion was at issue. The workplace "need not become a religion-free zone." *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1842 (2014) (Kagan, J., dissenting). See also *Thomas* v. *Review Board*, 450 U.S. 707, 717 (1981) (employees should not be "put to a choice between fidelity to religious belief or cessation of work").

III. The Tenth Circuit's Ruling Ignores the Important Role that Religion Plays in American Society, Including in the Workplace.

From its earliest foundations, our nation has embraced the idea that religion is an inherent part of the human condition. The Declaration of Independence's defense of the American Revolution proceeded from the "self-evident" truth that all persons "are endowed *by their Creator* with certain unalienable rights." Declaration of Independence, para. 2 (emphasis added).

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[20] This number does not include monetary benefits obtained through litigation. U.S. Equal Employment Opportunity Commission. Religion-Based Charges, FY 1997 – FY 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm (last viewed Dec. 9, 2014).

Since that time, this Court has recognized "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984). Simply stated, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).

This embrace of religion encompasses "two concepts," both the "freedom to believe" and the "freedom to act." *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 303 (1940). Thus, not only do we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary," *Zorach*, 343 U.S. at 313, but our Constitution also "affirmatively mandates accommodation, not merely tolerance, of all religions," *Lynch*, 465 U.S. at 673. Thus, our laws do not assume that citizens will engage in religious exercise only at home or in places of worship, but rather anticipate that religion will manifest in all aspects of American life, including the workplace. *See id.* (noting that "respect[ing] the religious nature of our people" and accommodating "all forms of religious expression" are among "the best of our traditions."); *see also* International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (recognizing that religious beliefs are protected "individually or in community with others and in public or private," "in worship, observance, practice, and teaching").

This embrace of religion as an inherent aspect of human life serves two critical purposes in our democracy. First, acknowledging that religion has roots deep within the human race suggests that efforts to "restrict or suppress the religious lives of human persons"

would violate an "existentially innate part of human personhood."[21] It also reinforces an understanding that "states will only ever be able to significantly restrict religious freedom in their societies by resorting to highly coercive and violent, and thus illegitimate, and likely reprehensible, means," thereby stigmatizing and discouraging such efforts.[22]

Second, securing a robust role for religion in public life facilitates the general morality that has always been deemed essential to the preservation of our free society. As early as 1778, the Continental Congress expressed its conviction that "true religion and good morals are the only solid foundations of public liberty and happiness." 12 *Journals of the Continental Congress* 1001 (Worthington Chauncey Ford ed., 1908) (Oct. 1778). Benjamin Franklin explained that "only a virtuous people are capable of freedom," because "[a]s nations become corrupt and vicious, they have more need of masters." Letter from Benjamin Franklin to the Abbés Chalut and Arnaud (April 17, 1787) *in* 9 *The Writings of Benjamin Franklin*, at 569 (Albert Henry Smyth ed. 1906). John Adams concurred with his well-known declaration that "we have no government armed with power capable of contending with human passions unbridled by morality and religion. * * * Our Constitution was made only for a moral and religious people." Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of

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[21] *Homo Religiosus* (manuscript at 34).

[22] *Ibid.* One need only glance at many conflict spots around the world—Syria, Iraq, Burma, China, Nigeria, and North Korea, among many others—to see that religious belief is not an issue that can simply be wished away. It must be met on its own terms.

Massachusetts (Oct. 11, 1798), *in* 9 Works of John Adams, at 229 (Charles Francis Adams ed. 1854).

Alexis de Tocqueville clarified that it was not the specific creeds, modes of worship, or deities of any one religion that were essential to filling this role. It was simply that religions generally "agree in respect to the duties which are due from man to man" and "preach the same moral law." Alexis de Tocqueville, I *Democracy in America* 326 (Henry Reeve trans., 1899) (1835). Tocqueville knew that religion had a role in preserving American democracy by promoting voluntary compliance with the law. "[R]eligion exercises but little influence upon the laws and upon the details of public opinion, but it directs the manners of the community, and by regulating domestic life it regulates the State." *Id.* at 372. And although it is human nature, and not any particular concept of the Divine, that law must take into account, our nation's historical embrace of religion in public life has always had, and continues to have, an important function in fostering the general morality that is essential to preserving our free society.

* * *

Our constitution and laws not only assume, but depend upon, religion playing a robust role in society. The Tenth Circuit's ruling rejects that perspective by permitting employers to ignore evidence of religious belief, and even discriminate against employees on the basis of religion unless the employees explicitly assert that they are protected under Title VII. Such an approach marginalizes religion, denying the critical role it plays in society.

CONCLUSION

For the foregoing reasons, the decision below should be vacated.

Respectfully submitted.

ERIC S. BAXTER
Counsel of Record
ERIC C. RASSBACH
ASMA T. UDDIN
DIANA M. VERM
The Becket Fund
for Religious Liberty
1200 New Hampshire Ave.
NW, Ste. 700
Washington, DC 20036
ebaxter@becketfund.org
(202) 955-0095

Counsel for *Amicus Curiae*

DECEMBER 2014

No. 14-86

IN THE

Supreme Court of the United

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ILYA SHAPIRO
JULIO COLOMBA
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200

BRENDAN J. MORRISSEY
Counsel of Record
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
bmorrissey@wileyrein.com

Attorneys for Amicus Curiae

January 28, 2015

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QUESTION PRESENTED

Whether Title VII requires employers to ferret out any potential conflicts between their general workplace policies and their employees' religious practices, and whether employers can be held liable even where they have no knowledge of any such conflicts.

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Northcross v. Board of Education of Memphis City Schools, 412 U.S. 427 (1973)	9
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Roberts v. County of Fairfax, Virginia, 937 F. Supp. 541 (E.D. Va. 1996)	15
Smith v. United States, 133 S. Ct. 714 (2013)	13
Thomas v. National Association of Letter Carriers, 225 F.3d 1149 (10th Cir. 2000)	9
Thomas v. Review Board of the Independent Employment Security Division, 450 U.S. 707 (1981)	12-13
United States v. Seeger, 380 U.S. 163 (1965)	12
Welsh v. United States, 398 U.S. 333 (1970)	12

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EEOC Compliance Manual § 12-I (July 22, 2008) (available at http://www.eeoc.gov/policy/docs/religion.html) ..... .10, 12

EEOC, Best Practices for Eradicating Religious Discrimination in the Workplace, (July 23, 2006) (available at http://www.eeoc.gov/policy/docs/best_practices_ religion.html).....19

EEOC, Pre-Employment Inquiries and Religious Affiliation or Beliefs (available at http://www.eeoc.gov/laws/practices/inquiries_religious.cfm) (last visited Jan. 27, 2015) 20

EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002) (available at http://www.eeoc.gov/policy/docs/accommodation.html).. ..... .14

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review.*

This case concerns Cato because it exemplifies how unclear statutory and regulatory burdens can restrict economic liberty, chill employment decisions, and otherwise catch conscientious and law-abiding citizens in no-win situations. In particular, the EEOC's position in this case, if adopted by the Court, would impose on employers subject to Title VII unclear standards for determining when a religious accommodation might be necessary, and would shift the burden of coming forward with information regarding the need for such an accommodation from the individual to the employer. Cato believes that employers should have fair notice of their statutory and regulatory obligations, and that employees who seek religious (or other) accommodations from their employers do so consistent with personal responsibility.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

At its core, this case presents the question of when an employer must initiate a dialogue with its employee or prospective employee about any possible religious accommodations that may be necessary under Title VII. The answer is that the employer must have actual notice of a potential conflict between an employee's religious practices and the employer's workplace rules and policies—and that the employee bears the burden of providing that notice. Any other rule not only foments tremendous awkwardness in the employer-employee relationship, but puts the employer in the untenable position of having to inquire into certain sensitive personal information even as such queries themselves are legally disfavored.

The obligation to consider a reasonable accommodation of a religious practice or observance—a noble legislative goal, to be sure—can only begin when the employer has actual knowledge of a potential conflict between its general workplace rules and policies and an employee's religious practices, as the Tenth Circuit held. While the EEOC and its *amici* agree that they do not care for the actual knowledge standard, that is about all they agree on—each has proposed its own formulation for when an employer has sufficient notice of a conflict. Indeed, the EEOC itself has proposed two or three different standards, none of which is well-defined. If the EEOC and its *amici* cannot discern the proper standard, how are employers supposed to? Such irresolution contravenes foundational principles of fairness and due process.

In any event, an actual-knowledge standard is the only one that makes sense in an accommodation case. This standard has been used in the substantially similar ADA context for years, and using it in Title VII accommodation cases would promote uniformity and consistency of application. It also makes sense in light of the highly personal nature of the interest involved: like the limitations of a disability, the beliefs and practices associated with a particular religion are known only to the person who experiences them.

It is also clear that, where the employer does not have sufficient knowledge of a conflict between religious practices and workplace rules and expectations, the employee must bear the burden of putting the employer on notice. This is again largely driven by the highly personal nature of religious beliefs and practices: the employee is in the best position to have information regarding the nature of his or her religious beliefs and concomitant practices, and hence to come forward with information regarding a potential conflict. Contrary to the assertions made by the EEOC and its *amici*, an employee need not have knowledge of an employer's specific rules or policies in order to spot a potential conflict. An employee's own self-awareness that his religious beliefs are often at odds with societal norms is sufficient to put the employee on notice of a possible conflict. Thus, the employee will be in the best position to broach the need for a potential religious accommodation in nearly every case.

Further, allocating the burden in this manner will protect important public policies. In particular, if an employer can be held liable for not accommodating a religious practice even if the employee has not conveyed

the potential need for such accommodation, the careful employer could be compelled to take actions to assure itself that religion is not an issue—including disclosing all of its reasons for taking an adverse employment action, acting on stereotypes and generalizations, or asking applicants and employees intrusive questions about their religious beliefs and practices. None of this is desirable, to say the least. Moreover, interpreting Title VII in this manner would leave employers open to ambush by their employees and would risk making religion a preferred class vis-à-vis Title VII's other protected classes.

ARGUMENT

I. An Employer Must Have Actual Knowledge Of The Potential Need For A Religious Accommodation To Trigger Title VII Obligations.

The Tenth Circuit found that an employer's Title VII duty to reasonably accommodate is not triggered unless the employer has actual knowledge that an accommodation might be needed for religious reasons. The EEOC apparently believes otherwise, but the Court should affirm the Tenth Circuit's sensible conclusion.

A. The EEOC Does Not Propose a Coherent Alternative Standard.

1. While it contends that actual knowledge is not the proper rule, the EEOC conspicuously never comes out and says what the rule should be. Instead, it vacillates between various renditions of its proposed test. In its merits brief, for example, it claims that "[t]he text of Title VII reaches employers who discriminate based on

what they understand to be religious practices." Brief of Petitioner 18 ("Pet'r Br."). But a few sentences later, the EEOC slightly modifies its position, claiming that an employer may not refuse to hire a person "on the basis of what it *correctly* understands to be a religious practice." Pet'r Br. 18–19 (emphasis added). Further muddying the water is the EEOC's repeated refrain that employers have legal obligations if they merely "suspect a possible conflict." One cannot be sure what that even means—*e.g.*, whether it reflects a "reasonable employer" standard, or even if it is subjective or objective.

The *amicus* briefs supporting the EEOC are also all over the map. *Compare* Brief Amicus Curiae of the Becket Fund for Religious Liberty Supporting Petitioner 8 (Dec. 10, 2014) ("[*A*]*ny* notice of a potential religious conflict should trigger the employer's duty .") *and* Brief of Amicus Curiae the Council on American-Islamic Relations In Support of Petitioner 11–12 (Dec. 10, 2014) ("CAIR Br.") ("[A]n employer has an obligation to offer a reasonable accommodation where they have 'enough information' about an employee's need for religious accommodation from *any* source.") *with* Brief for the State of Arizona et al. as Amici Curiae Supporting Petitioner 5 (Dec. 10, 2014) ("Once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict . . . .") *and* Brief of Amicus Curiae Lambda Legal Defense & Education Fund, Inc. in Support of Petitioner 10 (Dec. 10, 2014) (arguing that "wearing a headscarf to an interview with an employer who forbids headscarf wearing in the workplace . . . 'provid[es] enough information' about a potential conflict over such a ban") *and* Brief of Amici Curiae Fifteen Religious and Civil

Rights Organizations In Support of Petitioner 6 (Dec. 10, 2014) ("Fifteen Religious Orgs. Br.") ("[M]erely by observing an applicant's dress, a potential employer may learn that a work conflict is likely.").

If even the EEOC and its *amici* cannot discern the proper standard, how can employers be expected to?

2. Perhaps because the proposed rule has not been clearly defined, the EEOC offers no clues as to when or how it could be satisfied—except to say it was satisfied on the facts of this case. But such a "rule" offers no guidance to employers on what their duties are. One can with little imagination envision myriad scenarios in which an employer, endeavoring to adhere to the EEOC's "rule," is left adrift, adopting ad hoc policies to fill the void. Say that a man attends an interview with waist-length dreadlocks. On the EEOC's "standard," would it be unlawful for a fashion retailer to reject his application? Should the retailer understand that the hairstyle is religious just because it knows that some Rastafari adherents believe dreadlocks are required? What if the retailer is not well-versed in Rastafarianism? Does the answer change if, prior to the interview, the retailer discovers via the applicant's Facebook page that he is an avid listener of reggae music and friends with several persons who subscribe to Rastafarianism? Does this constitute "enough information" about the applicant's need for a religious accommodation to trigger the retailer's duty? For that matter, is it now the employer's duty to scour the applicant's social media pages and make inferences therefrom?

Or consider, for example, a second-year law student who, during a callback interview with a large firm, is taken to a seafood restaurant. If despite the hiring partner's insistence that the student try the delicious crab cakes, the student opts for salmon instead, should the firm suspect that the student will require a Sabbath accommodation? Does the firm have "enough information" about the student's need for a religious accommodation? What if the student's resume indicates that he serves as the praise and worship leader of his local Seventh-Day Adventist church? Must the firm then broach the conversation about whether a religious accommodation is needed? Does the answer change if the firm discovers pictures on the student's Instagram page depicting him engaged in secular activities during Sabbath hours?

The answer to all of these questions, of course, is "it depends," which is precisely the problem. Employers would be tasked with exactly this kind of religious refereeing under the EEOC's "standard," but would have no measuring stick. The chasm between "correctly understands," "suspects a possible conflict," and the "reasonable employer" is sufficiently wide to reach a whole host of scenarios for which the EEOC's proposal provides no guidance whatsoever.

Employers—indeed, all parties regulated by statute and regulation—need clear guidance as to what their duties are if they are to be expected to comply with them. It is a bedrock principle of our legal system that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)

("Vague laws may trap the innocent by not providing fair warning."); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) ("[A]gencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)). The EEOC's proposed "rule"—if it can be called one—does exactly the opposite; it is not sufficiently clear to put employers on notice of their legal obligations when an incident of non-compliance with neutral workplace rules occurs.

B. An Actual-Knowledge Standard Is Familiar to Employers and Sufficiently Protective of Employers and Employees.

Instead of leaving employers adrift, as the EEOC would have it, this Court should hold that the process of accommodating religious practices and observances can begin only where an employer has actual knowledge of a conflict between workplace rules and a religious practice. This actual knowledge standard, employed in ADA-accommodation cases, is best because it is already familiar to employers and accounts for the inherently personal nature of religious belief and practice.

1. As the Tenth Circuit noted, numerous courts have held that, under the ADA, an employer's obligation to accommodate does not arise until the employee has made

an adequate request for an accommodation. Appendix to Petition for Writ of Cert., at 69a–70a (July 25, 2014) ("Pet. App.") (citing cases). Employers thus are already familiar with the level of knowledge required to trigger an ADA accommodation discussion. Indeed, because the statutes employ similar language, *see Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 & nn. 5 & 6 (10th Cir. 2000) (recognizing the similarities between reasonable accommodation requirements in the ADA and Title VII contexts), imposing the same standard in a Title VII religious accommodation case would promote consistency and certainty. *See Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (stating that similarity in language in two statutes "is, of course, a strong indication that the two statutes should be interpreted *pari passu*"); *see also* H.R. Rep. No. 102-40, pt.2 at 47 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 697 ("A number of other laws banning discrimination, including the [ADA] and the [ADEA] are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII.").

Adapting the ADA's actual-knowledge standard to Title VII accommodation cases also makes good practical sense. Employers are not mind-readers. The highly personal and individualized nature of a disability and the manner in which it impacts a person's ability to do a particular job, and consequently the need for an accommodation, are known only to the employee; so too for religious beliefs and practices. *Compare* Pet'r Br. 32 (under the ADA, an employer has a duty to accommodate if it "know[s] of both the disability *and* desire for accommodation") (emphasis

added), *with* EEOC Compliance Manual § 12-I (July 22, 2008) (available at http://www.eeoc.gov/policy/docs/religion.html) (recognizing religious practices are highly individualized).

As is the case under the ADA, adopting an actual knowledge standard in Title VII religious accommodation cases is not to say that "magic words" are necessary or that the information must come directly from the employee. As Respondent rightly concedes, Brief of Respondent 47 n.6 (Jan. 21, 2015) ("Resp. Br."), it can still be proven that an employer had actual knowledge of a possible conflict between workplace rules and religious practice without evidence that the employee initiated a formal sit-down with the employer, so long as other evidence shows that the employer was actually on notice of the need for an accommodation.

2. A standard short of actual knowledge would leave the hypothetical employers discussed above vulnerable to an EEOC charge and lawsuit. If the benign act of an applicant styling his hair in a particular way, wearing a particular article of clothing, or refusing to eat a certain dish that may be (but is not necessarily) associated with particular religious beliefs is sufficient to put the employer on notice, then *any* form of fashion, grooming, or dietary practice associated with a particular person's "religion"—no matter how idiosyncratic—may lead the EEOC or a court to conclude that the employer "should have" known a religious accommodation was needed. Indeed, an employee who knows that any notice of a potential religious conflict is sufficient notice under Title VII, and who has outwardly displayed some practice associated with his religion, could simply assume that his employer was on notice and then

assume that any adverse employment action related to that practice was taken "because of" his religion. *Cf. Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212, 1218 (8th Cir. 1999) (noting that an employee "cannot expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it.") (citation omitted). This is particularly true with respect to adherents of lesser-known religions or those members of conventional religions who engage in practices atypical of the mainstream. Employers should not be expected to keep an up-to-date guide to the world's religions in their Human Resources departments, much less require their staff to memorize it.

3. In any event, actual knowledge that a particular non-conforming practice is "religious" must be present in any case that does not involve disparate impact. Here, the EEOC does not advance a disparate impact theory of the case; its theory is one of intentional discrimination. Pet'r Br. 21 (claiming that Respondent failed to hire Ms. Elauf "'because of' an aspect of religious observance and practice"). It is well established that a suit for intentional discrimination can succeed only where adverse action is taken on account of—and not in spite of—the protected trait, which requires actual knowledge of the trait. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275 (1993). Because practices and observances are not protected as "religion" unless they are taken as part of a sincerely held religious belief, it follows that the employer must know not only of the employee's religious beliefs, but also of the connection between those beliefs and the practices at issue. Put differently, because the EEOC maintains that Respondent subjected Ms. Elauf to

an adverse employment action "because of" her religion, it must show that Respondent *knew* that she engaged in the practice for religious—as opposed to any other—reasons. Respondent simply could not have taken the action "because of" Ms. Elauf's religion if it did not know the religious basis for the offending practice.

II. Employees Must Bear The Burden Of Putting An Employer On Notice Of The Need For A Religious Accommodation.

Regardless of the appropriate knowledge standard, accommodation cases will always present the question of who bears the risk that the employer and employee will not have sufficient information to recognize that an accommodation might be warranted. The inherently personal nature of the interest involved, along with other factors, suggest that employees should bear this burden.

A. Whether a Practice Is "Religious" Is Inherently Unknowable to an Employer.

As the Tenth Circuit properly recognized (citing the EEOC), "religion" does not merely denote membership in a traditional, well-known, or organized religious group, but rather refers to a sincerely held, substantive, and personal belief system concerning ultimate ideas about life, purpose, and death. Pet. App. 15a–19a (citing EEOC Compliance Manual § 12-I). That is consistent with this Court's understanding of religion under the First Amendment. *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 173, 185 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450

U.S. 707, 715-16 (1981); *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989).

A personal belief system may manifest itself through certain practices and observances. But because a person's "religion" cannot be defined by anyone other than the person holding those beliefs, whether a practice is tied to beliefs is inherently unknowable to anyone other than the person who holds those beliefs and engages in that practice. *See* Pet. App. 41a (citing cases for the proposition that outward manifestations of religious *affiliation* are not sufficient indicia of religious *belief*). This is as true for employers as it is for any third party. An employer simply cannot chalk up a particular practice to "religion" unless it also knows that there are sincerely held, personal beliefs that go along with it.

B. Employees Are Better Positioned Than Employers to Break an Informational Stalemate.

Because of the highly personal nature of religious beliefs and practices, in the ordinary case of a conflict between employer expectations and an employee's religious practices, the employee is in a superior position to know about that conflict and the religious basis for his or her practices. Resp. Br. 48. This is the strongest indication that the burden to put an employer on notice should be placed on the employee. *See, e.g.*, *Smith v. United States*, 133 S. Ct. 714, 720 (2013) ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof.") (quotation marks and alterations omitted). This conclusion is bolstered by several considerations.

1. Placing the burden on the employee is sufficiently protective of employees. An employee, with superior knowledge of the religious basis for his non-conforming practices, can take steps to inform the employer of the conflict whenever the conflict arises. Indeed, an adverse employment action need not spell the end of the accommodation process; in the event of a termination or a failure to hire, the employee can still make his or her employer aware of the religious basis for the conflict and seek to reach a reasonable accommodation.

Instructively, employees bear the burden of coming forward with information sufficient to put their employers on notice that a reasonable accommodation of a disability is necessary under the ADA. *See* EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002) (available at http://www.eeoc.gov/policy/docs/accommodation.html) (making clear that a reasonable accommodation must be requested and put the employer on notice that a request is being made for accommodation of a disability, as opposed to making a general statement about workplace or job preferences). It would be odd, to say the least, if what is sufficiently protective of the right to a reasonable accommodation on the basis of disability under the ADA is insufficient to protect the right to a religious accommodation under Title VII.

2. Allocating the burdens in this manner will protect important public policies. In particular, Title VII is a limited intrusion into the ordinary doctrine of employment at will. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008) (employment at will doctrine allows an employer to terminate an employee for a "good reason, bad reason, or

no reason at all") (quotation marks and citation omitted). All else being equal, and in the absence of any indication that a protectable right would be violated, employers should be free to take adverse employment actions for any reason or no reason whatsoever. An employer that has insufficient information to conclude that a failure to comply with a workplace rule is due to "religion," but who knows that it is the employee's responsibility to note the existence of a possible conflict, can take an adverse employment action without fear of liability, consistent with employment-at-will principles. Allocating the burdens in this manner will also ensure that a person who desires a departure from the status quo should exercise personal responsibility for requesting it. *See, e.g.*, *Roberts v. County of Fairfax, Va.*, 937 F. Supp. 541, 549 (E.D. Va. 1996) (finding, in ADA accommodation case, that employer did not violate ADA by failing to unilaterally offer accommodation where none was requested because "[t]o rule otherwise here would effectively countenance an erosion of personal responsibility that finds no basis in the ADA or sound public policy").

3. The EEOC and supporting *amici* contend that placing the burden on the employee will leave job applicants insufficiently protected because they cannot be expected to know all of the rules with which they will be expected to comply at the time they apply. As Respondent rightly notes, it is the rare occasion when an employee will not be in a position to recognize the conflict between his/her practice and workplace rules. Resp. Br. 48-49. After all, if an employee does not know his religious practices, it would contravene Title VII even to call them "religious." In any case, it would make no sense to craft a rule based on such an exceptional (if not impossible) case.

More practically, though, this apparent harshness is tempered by the fact that job applicants with sincerely held religious beliefs and practices do not live in a bubble. As *amici* supporting the EEOC have recognized, many—if not most—employers impose grooming and dress requirements on their employees and/or have expectations regarding employees' ability to work on weekends. *See* Fifteen Religious Orgs. Br. 5 (stating that the need for religious accommodation is "particularly acute" in areas of grooming, dress, and scheduling because religious observances "often conflict with mandatory work schedules" and "the public image employers seek to portray"); CAIR Br. 8 (noting that a "broad swathe of religious communities," including Sikhs, Rastafarians, Messianic Christians, and Jews often encounter "employment challenges" because of their "required [] grooming and dress" practices); *see also* Pet. App. 131a ("Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules."); Pet'r Br. 27 (noting that "[a] number of religions have garb and grooming requirements" that may conflict with an employer's rules"). Prospective employees have enough self-awareness to know when their religious practices—often at odds with societal norms—conflict with these kinds of *general* workplace rules and expectations. And if they are not even aware of the potential conflict, how can an employer—which, again, knows less about the applicant's beliefs and practices—be expected to recognize it?

A self-aware prospective employee could easily take the initiative to raise the issue with the employer in order to determine whether a conflict might exist, even without knowing that a *particular employer* has a specific

grooming or attendance policy. For example, most retail jobs will require employees to be available to work on weekends. An applicant interviewing for a retail position who knows that she will not be available to work from Friday at sundown to Saturday at sundown is certainly in a position to raise the issue with her prospective employer even in the absence of any knowledge about that employer's work-schedule expectations.

In sum, the employee is the party best able to bear the burden of providing an employer with information sufficient to put the employer on notice that a religious accommodation might be necessary. Countervailing concerns regarding the protection of job applicants are insufficiently weighty to dictate a contrary result.

C. Placing The Informational Burden on the Employer Would Lead to Undesirable Consequences.

In contrast to placing the burden on the employee to come forward with information relating to the need for an accommodation, there would be many unwelcome effects if the burden is on the employer to discern whether religion might be a motivating factor behind particular employee actions or behaviors that would otherwise lead to discipline, termination, or a decision not to hire.

1. Averse to the risks of potential future liability under an anti-discrimination statute like Title VII, an employer saddled with the burden of determining whether a particular employee's practice is connected to religion will not be able to take an adverse employment action until it has satisfied itself that religion was *not* the reason

for the offending action—even if there is no evidence to suggest that religion played any role whatsoever.

An investigative prerequisite of this kind is directly at odds with the normal principle of at-will employment. Employers seeking to reassure themselves that religion is not at issue could feel compelled to disclose to employees all of their reasons for taking an adverse employment action in the hopes that, if there is a religious motivation for the employee's action or behavior, the employee will raise it at that time. This turns the normal employer-employee relationship on its head.

2. Allocating the burdens in this manner will also lead employers to engage in unseemly behaviors that the EEOC itself ordinarily discourages. For one, employers will inevitably stereotype their employees. An employer will assess whether a particular instance of non-compliance with workplace rules is based on "religion" (and whether the employer should inquire further into the situation) based on what little they know about religion, much of which will be based on educated (and uneducated) guesses and broad generalizations. For example, imagine an employee who fails to show up for a scheduled Friday evening shift, an infraction that could ordinarily lead to discipline or termination. The employer with the burden of ensuring that the failure to show up at the appointed time was not based on religion, however, would make the determination of how to react based on what little he knows about religion, and would likely treat the employee differently if his name is O'Sullivan than it would if the employee's name is Cohen. Likewise, an employer interviewing a bearded candidate name Muhammad might assume that the candidate would be taking time to pray

five times daily, or that a candidate wearing a crucifix and long skirt might not be able to work on Sundays.

This Court has recognized "that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of" employees as they concern one of Title VII's protected characteristics, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (addressing gender stereotypes), and the EEOC itself has rightfully discouraged this distasteful way of thinking, *see, e.g.*, EEOC, Best Practices for Eradicating Religious Discrimination in the Workplace (July 23, 2006) (available at http://www.eeoc.gov/policy/docs/best_practices_religion.html) (Employers should "avoid assumptions or stereotypes about what constitutes a religious belief," and managers "should be trained not to engage in stereotyping based on religious dress and grooming practices.").

This general aversion to stereotyping is justified, as it harms everyone. Employees who outwardly manifest a connection to a well-known religion might be unfairly assumed to adhere to all of the common practices of that group when they do not, and people who outwardly manifest nothing commonly associated with a major religious practice might be unfairly assumed to have no religious beliefs. Placing the burden of coming forward with information relating to the need for a religious accommodation on the employee would allow the employer to ignore these stereotypes, as it should.

A second unseemly practice that will naturally follow from placing the informational burden on employers is that employers will be led to make inquiries into their

employees' private religious practices. This will often follow on the stereotypes discussed above. When, based on stereotypes, it appears that an employee might engage in a religious practice that conflicts with a workplace rule or business need, the employer will have no choice but to ask questions and take other actions designed to "flush out" information regarding the employee's religious practices. Given the personal, private nature of religious beliefs, and the societal presumption that the person who holds them decides when and how to make them known, asking questions of this kind is in very poor taste.

Although the EEOC now apparently believes that asking questions designed to bring to light religious conflicts is desirable because it would further Title VII's supposed "objective of promoting dialogue," Pet'r Br. 26, it is exactly the kind of behavior that the EEOC typically discourages. *See* EEOC, Pre-Employment Inquiries and Religious Affiliation or Beliefs (available at http://www.eeoc.gov/laws/practices/inquiries_religious.cfm) (last visited Jan. 27, 2015) ("Questions about an applicant's religious affiliation or beliefs are generally viewed as non job-related and problematic under federal law."). In any event, if Title VII intends to promote dialogue between employer and employee, it intends to promote dialogue in reaching an accommodation *once an actual conflict is identified*, not an intention to gin up a conflict where none is otherwise apparent. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (approving of decisions finding that "bilateral cooperation is appropriate *in the search for an acceptable reconciliation* of the needs of the employee's religion and the exigencies of the employer's business.") (quotation marks and citations omitted) (emphasis added).

3. Placing the informational burden on the employer also puts employers at great risk of ambush. An employee could say and do nothing substantial, leaving only subtle clues as to his or her religious practices that could be used against the employer later. The religious basis for the conflict will then be known only when he or she files a charge with the EEOC. Title VII is a statute aimed at "eradicating discrimination," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994) (quotation marks omitted), not imposing liability for liability's sake. It should be interpreted and applied in a manner that protects the well-meaning and conscientious employer, particularly where (as here) disparate impact is not alleged.

4. Finally, while Title VII should and must protect employees from discrimination based on religion, its protections cannot be made so robust as to essentially require employers to grant preferential treatment on the basis of a protected characteristic. Placing the informational burden on employers and thereby forcing them to investigate whether their employees are not complying with neutral workplace rules for religious reasons—as opposed to secular reasons—runs the risk of making "religion" a preferred class, as opposed to merely a protected one. No one suggests, for instance, that an employer make inquiries into an employee's race, gender, or national origin before taking an employment action in order to ensure that a non-obvious characteristic associated with race, gender, or national origin does not inadvertently play a role in the decision. Religion must be placed on even footing with Title VII's other protected classes, not elevated above them.

It is no answer to suggest that Title VII itself treats religion more favorably than other protected characteristics by requiring an accommodation for religious practices but not for practices that are associated with other protected characteristics. *Cf.* Fifteen Religious Orgs. Br. 8 (stating that "religion requires special treatment"). That is not how Title VII works. Unlike the ADA, Title VII is not drafted in a way that makes the failure to accommodate a religious practice unlawful so long as the accommodation would not cause an undue burden. Instead, Title VII is drafted to protect "religion"—including religious practices—but to *exclude* from that protection any practice that an employer demonstrates that it could not "reasonably accommodate . . . without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j); *see also Ansonia*, 479 U.S. at 63 n.1 (stating that the "reasonable accommodation duty was incorporated into the statute[] somewhat awkwardly"). Religious practices are accordingly entitled to *less* protection than Title VII's "core" protections (race, color, religious belief, sex, and national origin). While the net effect of the provision is to require an accommodation for practices associated with sincerely held religious beliefs when one can be afforded without undue hardship on the employer's business, the accommodation merely puts religious practices on par with Title VII's other protected characteristics. It is not "special treatment." *Cf.* Fifteen Religious Orgs. Br. 8.

In sum, considerations of practicality and policy dictate that, if anyone is to bear the ultimate burden of putting an employer on notice of a need for a religious accommodation, it must be the employee.

CONCLUSION

Amicus respectfully asks that the Court affirm the judgment below.

Respectfully submitted,

ILYA SHAPIRO
JULIO COLOMBA
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200

BRENDAN J. MORRISSEY
Counsel of Record
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
bmorrissey@wileyrein.com

Attorneys for Amicus Curiae

January 28, 2015

No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

KATE COMERFORD TODD
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

MELISSA ARBUS SHERRY
Counsel of Record
ELANA NIGHTINGALE DAWSON*
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
melissa.sherry@lw.com

Counsel for Amici Curiae

* Admitted in Illinois only; all work supervised by a member of the DC Bar.

Additional Counsel Listed on Inside Cover

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, NW
Washington, DC 20004
(202) 406-4443

Counsel for Amicus Curiae
National Federation of Independent
Business Small Business Legal
Center

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. The Chamber often files amicus briefs in cases pending before this Court, and has recently filed amicus briefs in employment discrimination cases, including *Young v. United Parcel Service, Inc.*, No. 12-1226 (Oct. 31, 2014), and *Mach Mining, LLC v. Equal Employment Opportunity Commission*, No. 13-1019 (Sept. 11, 2014).

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB Legal Center is the nation's leading small business association, representing approximately 350,000 members across

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondent have provided written consent to the filing of this amicus brief.

the country. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Amici's members are employers that are regulated by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and other employment statutes. They are potential defendants in discrimination suits of the sort at issue here (*i.e.*, alleging a failure to reasonably accommodate a religious observance or practice) and, thus, they have a strong interest in the proper resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII prohibits discrimination in employment because of an individual's religion, and that prohibition includes discrimination because of an individual's religious observances or practices, unless the employer is unable to reasonably accommodate such observances or practices without undue hardship. 42 U.S.C. § 2000e-2(a); *id.* § 2000e(j). The question presented here asks whether, to be liable under Title VII, an employer must have actual knowledge that a religious accommodation was required, and whether that actual knowledge must be based on direct, explicit notice from the applicant. Pet. Br. (I). Before the Court can begin to answer that question, however, it is necessary to first examine the origins of the "notice requirement," and to place the underlying religious-discrimination claim in its proper context. With this brief, amici seek to provide the Court with that essential context.

There is considerable doctrinal confusion surrounding religious-discrimination cases alleging a failure to reasonably accommodate a religious observance or practice. No one doubts that an

employer's failure to accommodate an employee's religious observance or practice can, in some situations, give rise to liability under Title VII. The real questions are "under what theory," and "what is the proper remedy." Title VII claims traditionally come in one of two forms: disparate treatment (*i.e.*, intentional discrimination) or disparate impact (*i.e.*, a neutral policy that is discriminatory in its effect). A disparate-treatment claim can give rise to compensatory and punitive damages; a disparate-impact claim cannot. And so for that reason, among others, the label matters.

For years, however, the EEOC, private plaintiffs, and some courts have approached religious-accommodation cases as if they present a third, independent Title VII claim—one of "failure to accommodate"—that requires no proof of discriminatory intent, but that nevertheless gives rise to a claim for damages. Indeed, that is precisely how this case was litigated to judgment (and a $20,000 compensatory-damages award) below. But there are two problems with that approach. First, and most importantly, it allows for the recovery of damages without any showing of intentional discrimination, in direct contravention of the statute Congress enacted. Second, a freestanding "failure to accommodate" claim finds no support in the statutory text, structure, or history. Most religious-accommodation cases do not involve allegations of discriminatory motive or intent and, thus, are not properly characterized as disparate-treatment claims. Such cases instead rest on the employer's application of a neutral employment policy that, absent accommodation, will adversely impact an employee's religious observance or practice. In the

disparate treatment/disparate impact dichotomy, such a claim falls on the disparate impact side of the line.

Perhaps recognizing the flaws in its prior litigating position, the government's merits brief in this Court changes course and reframes this case as one of disparate treatment. The government's novel theory of intentional discrimination cannot be squared with this Court's case law or the EEOC's own formal guidance. And endorsing it would only add more confusion to an area of employment-discrimination law that has already lost its way. This Court should reject the government's invitation to further confuse the law governing claims of religious discrimination, declare that there is no freestanding "failure to accommodate" claim under Title VII, and, at the very least, confirm what the statute makes clear: in the absence of "intentional discrimination," damages are not an available remedy.

ARGUMENT

I. THERE IS NO FREESTANDING "FAILURE TO ACCOMMODATE" CLAIM UNDER TITLE VII

For years both the litigating position of the EEOC and the appellate case law have obscured the legal theory underlying a Title VII discrimination case premised on an employer's failure to reasonably accommodate an employee's religious observance or practice. This has, in turn, distorted the remedies available for such a claim. Plaintiffs have brought claims, and courts have awarded damages, based on a freestanding "failure to accommodate" theory that finds no support in the statutory text, structure, or history. Although the government pursued this

approach below and through the certiorari process, it now abandons that claim, and for good reason. In answering the question presented in this case, the Court should do the same and provide much needed doctrinal clarity to this area of the law.

A. The EEOC Has Advocated And Some Courts Have Recognized A Freestanding "Failure To Accommodate" Claim Without Identifying Its Statutory Source

Until now, the EEOC has litigated this case as if it presented a freestanding "failure to accommodate" claim under Title VII. In the district court, petitioner asserted that failing "'to make reasonable accommodation, short of undue hardship, for the religious practice of employees and prospective employees'" is itself "'a violation'" of Title VII. EEOC Mot. for Partial Summ. J. ("EEOC MSJ") 16, No. 4:09-cv-00602-GKF-FHM (N.D. Okla.), ECF No. 68 (quoting *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 (10th Cir. 1984)). Endeavoring to prove such a claim (*i.e.*, "a claim of religious discrimination for failure to accommodate a religious belief"), petitioner argued that it need only prove three things: (1) that the prospective employee "had a bona fide religious belief that conflicts with an employment requirement"; (2) that "she informed the employer of this belief"; and (3) that "she was not hired for failure to comply with the employment requirement." *Id.* The employer would then have the burden to "rebut one or more" of those elements, "show that it offered a reasonable accommodation," or demonstrate that it was unable to do so "without undue hardship." *Id.*

The district court adopted and applied the burden-shifting approach advanced by petitioner. Pet. App.

109a. In doing so, the court acknowledged that this was a fundamentally different test than the one applied in other Title VII cases. *Id.* at 109a n.5. Rather than "'probe the subjective intent of the employer,'" this "'burden-shifting mechanism'" serves only to "'prove or disprove the reasonableness of the accommodations offered or not offered.'" *Id.* (quoting *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 n.6 (10th Cir. 2000)). According to the court, deviating from the standard inquiry was warranted because, in a religious-accommodation case, "'Congress has already determined that a failure to offer a reasonable accommodation to an otherwise qualified .. employee *is* unlawful discrimination.'" *Id.* (quoting *Thomas*, 225 F.3d at 1155 n.6). In that respect, the court noted, a "'religious failure to accommodate[] case'" is treated the same as a failure to accommodate case brought under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* Pet. App. 109a n.5 (citation omitted). Critically, the EEOC sought, and the district court allowed a jury to award, compensatory damages on this claim. *See id.* at 12a.

On appeal too, the EEOC "presented a religious-discrimination claim based upon [respondent's] alleged failure to accommodate" a conflicting religious practice, Pet. App. 21a, and again relied on a burden-shifting mechanism designed to prove an employer's failure to accommodate—and nothing more, EEOC C.A. Br. 25. The court of appeals proceeded based on the understanding that "[r]eligion-accommodation claims are a subset of the types of religion-discrimination claims that an applicant or employee may present under Title VII," Pet. App. 22a; that there are "'several different theories'" that can be asserted under Title

VII, "'including disparate treatment and failure to accommodate,'" *id.* (quoting *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004)); and that, in the words of the EEOC, "'religious accommodation claim[s are] distinct from . . . disparate treatment claim[s],'" *id.* at 23a (quoting *EEOC Compliance Manual* § 12-IV, at 46 (2008)).[2] As the court further explained, the question for a disparate-treatment claim is "'whether employees are treated equally,'" whereas the question for a "'denial of religious accommodation'" claim is whether the failure to adjust a "'neutral work rule . . . infringes on the employee's ability to practice his religion.'" *Id.* (quoting *EEOC Compliance Manual* § 12-IV, at 46).

This case is by no means unique. For years, other courts have adjudicated "failure to accommodate" religion cases as if they presented a freestanding claim under Title VII. *See, e.g., Antoine v. First Student, Inc.*, 713 F.3d 824, 830-31 (5th Cir. 2013); *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 319 (3d Cir. 2008); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005); *Mann v. Frank*, 7 F.3d 1365, 1368-69 (8th Cir. 1993); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486-87 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990). Courts have treated religious-accommodation claims differently than disparate-treatment claims. *See, e.g., Chalmers v. Tulon Co.*, 101 F.3d 1012, 1018 (4th Cir. 1996), *cert. denied*, 522 U.S. 813 (1997); *Mann*, 7 F.3d at 1368-70. They have applied a burden-shifting framework designed to determine whether the employer satisfied its accommodation obligation, not

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[2] *Available at* http://www.eeoc.gov/policy/docs/religion.pdf.

whether it acted with a discriminatory motive. *See, e.g., Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133-34 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986). And some (like the district court in this case) have assumed that a plaintiff may recover damages for an employer's failure to accommodate. *See, e.g., Heller v. EBB Auto Co.*, 8 F.3d 1433, 1441-42 (9th Cir. 1993). These courts have done so without a critical examination of the statutory foundation for a stand-alone "failure to accommodate" claim—or the consequences of recognizing such a claim.

The question presented in this case is a product of that adjudicatory history. It asks this Court to determine the precise contours of the "notice requirement," *i.e.*, one of three elements of the prima facie inquiry designed only to prove a failure to accommodate. But that judicially crafted requirement (whatever its contours) appears to rest on a fundamentally flawed premise: that there is a distinct and freestanding religious-accommodation claim under Title VII. And the premise underlying this entire case—that such a claim can give rise to compensatory damages—is similarly flawed. Apparently recognizing that its prior litigating position is untenable, the government now reframes its claim as one of disparate treatment. *See* Pet. Br. 19. But that only further muddies the doctrinal waters (*see* Part III, *infra*), and it leaves this Court in the unfortunate position of defining a "notice requirement" without understanding how that requirement is (or is not) relevant to establishing a Title VII violation.

B. There Is No "Failure to Accommodate" Claim Under Title VII Absent Disparate Treatment Or Disparate Impact

There is no freestanding "failure to accommodate" claim under Title VII. Instead, the statutory text, structure, and history indicate that a claim of religious discrimination (like any other Title VII claim) must be brought under one of two theories: disparate treatment or disparate impact.

A person aggrieved by an "unlawful employment practice" may bring a civil action against his employer. 42 U.S.C. § 2000e-5(f)(1). The question, then, is what constitutes an "unlawful employment practice." Title VII answers that question in Section 703(a), which is entitled "Unlawful employment practices." *Id.* § 2000e-2(a).[3] Section 703(a)(1) makes it an "unlawful employment practice" to, *inter alia*, "fail or refuse to hire . . . any individual because of such individual's . . . religion." *Id.* § 2000e-2(a)(1). This "principal nondiscrimination provision" holds "employers liable only for disparate treatment," *i.e.*, when an "employer has 'treated [a] particular person less favorably than others because of" their religion. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (alteration in original) (citation omitted); *see International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("[T]he most obvious evil Congress had in mind" was intentional discrimination.).

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[3] Section 704 describes "[o]ther unlawful employment practices," such as retaliating against an employee for opposing an unlawful employment practice or participating in a discrimination proceeding, but those unlawful practices are not at issue here. 42 U.S.C. § 2000e-3.

Title VII also makes it an "unlawful employment practice" to "limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" his religion. 42 U.S.C. § 2000e-2(a)(2); *see id.* § 2000e-2(k). That provision, as interpreted by this Court and as later recognized by Congress, targets "employers' facially neutral practices that, in fact, are 'discriminatory in operation,'" *i.e.*, "disparate impact." *Ricci*, 557 U.S. at 577-78 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

There is no textual support for a third, independent form of discrimination: failure to accommodate a religious observance or practice. The statute as amended does talk about "reasonabl[e] accommodat[ion]." 42 U.S.C. § 2000e(j). But it does so only in the context of defining the term "religion," in a section of the statute entitled "Definitions," separate and apart from the sections describing what constitutes an "unlawful employment practice." *Compare id.* § 2000e ("Definitions"), *with id.* § 2000e-2 ("Unlawful employment practices"), *and id.* § 2000e-3 ("Other unlawful employment practices"). Specifically, "[t]he term religion" is defined to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

That definition does not set forth an independent prohibition. To the contrary, it makes the inability to

reasonably accommodate a religious observance or practice a *defense* to liability. That is, when an employer is unable to reasonably accommodate a religious practice, that practice is excluded from the definition of "religion" entirely. To be sure, there would be no reason for Congress to include an exception for "undue hardship" if employers were never required to accommodate religion to avoid disparate-treatment or disparate-impact liability. But that merely confirms that an employer who has a discriminatory motive for refusing to accommodate an employee's religious practice, or one that refuses to make an exception to a neutral policy that has a disparate impact, may be liable if it cannot establish undue hardship. Nowhere does Title VII state that, if an employer can accommodate a religious practice without undue hardship, it has a freestanding obligation to do so—separate and apart from the prohibitions on disparate treatment and disparate impact.

When Congress intends to create a stand-alone "failure to accommodate" claim it knows how to do so. The ADA, for example, specifies that to "discriminate against a qualified individual on the basis of a disability includes . . . not making reasonable accommodations" for an employee's or applicant's disability and "denying employment opportunities to a job applicant or employee . . . based on the need [for a] reasonable accommodation." 42 U.S.C. § 12112(b)(5)(A)-(B). Title VII, in contrast, provides a definition of "religion" that informs the meaning of the substantive anti-discrimination provisions. For example, discriminating against an individual "because of such individual's . . . religion" includes discriminating

against that individual "because of" his religious observance or practice, unless accommodating such an observance or practice would be an undue hardship. 42 U.S.C. § 2000e-2(a)(1). Similarly, "a particular employment practice" would cause "a disparate impact on the basis of . . . religion" if it had a disparate impact on a particular religious observance or practice, unless accommodating such an observance or practice would be an undue hardship. *Id.* § 2000e-2(a)(2), (k).

The statutory history confirms this understanding. In 1991, Congress enacted the Civil Rights Act which amended Title VII and transformed Title VII litigation in two critical respects: (i) it provided a damages remedy for certain Title VII violations, and (ii) it codified the burden of proof for disparate-impact claims as well as corresponding defenses. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 3, 1977A, 105 Stat. 1071, 1071-73 (1991) ("1991 Act"). In both instances, Congress legislated with the understanding that there are only two ways of proving actionable discrimination under Title VII: disparate treatment and disparate impact. The stark dichotomy created between the two claims leaves no room for a third, unmentioned, and undefined religious-accommodation claim.

Under the 1991 Act, the remedies available to an employee differ based on the type of discrimination alleged. As originally enacted, "only equitable relief, primarily backpay, was available to prevailing Title VII plaintiffs." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999). The 1991 Act changed that. It provided for the recovery of compensatory and punitive damages, but limited such relief "to cases of 'intentional discrimination'—that is, cases that do not rely on the 'disparate impact' theory of discrimination."

Id.; *see* 42 U.S.C. § 1981a(a)(1) (damages are available if the employer has "engaged in unlawful intentional discrimination," but not if "an employment practice" is "unlawful because of its disparate impact"). And the corresponding right to a jury trial attaches only if the "complaining party seeks compensatory or punitive damages," *i.e.*, if the charge is one of "intentional discrimination." *Id.* § 1981a(c); *see* H.R. Rep. No. 101-644, pt. 2, at 36-37 (1990). The Title VII damages provision says nothing about "failure to accommodate" claims.

That omission is telling. The following two paragraphs of Section 1981a(a) address discrimination claims brought under the ADA. Like Title VII, a damages remedy is provided for claims of "unlawful intentional discrimination," but not for "an employment practice that is unlawful because of its disparate impact." 42 U.S.C. § 1981a(a)(2). Unlike Title VII, a damages remedy is *also* provided for a violation of the ADA provisions requiring employers to make a "reasonable accommodation." *Id.* Not only did Congress expressly mention such a claim, it specified a unique defense for "cases where a discriminatory practice involves the provision of a reasonable accommodation." *Id.* § 1981a(a)(3). In those cases, damages are not available if the "covered entity demonstrates good faith efforts." *Id.* Congress's failure to mention a comparable Title VII claim, let alone specify whether or when damages would be available for such a claim, strongly reinforces the reading otherwise dictated by the statutory text: a freestanding "failure to accommodate" claim does not exist.

The defenses available to an employer also differ based on the type of discrimination alleged. The 1991 Act codified the burden of proof for disparate-impact claims and created a corresponding business-necessity defense. *See* Pub. L. No. 102-166, § 3, 105 Stat. at 1071 (codified at 42 U.S.C. § 2000e-2(k)). An employer can defeat a claim of disparate impact by showing "that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Congress made clear, however, that "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter." *Id.* § 2000e-2(k)(2); *see* H.R. Rep. No. 101-644, pt. 2, at 24 ("[B]usiness necessity is never a defense to . . . disparate treatment"; it "may be used as a defense *only* against a disparate impact claim." (emphasis added)). Yet again, Congress legislated with the understanding that discrimination claims under Title VII come in only two forms.

Most appellate court decisions recognizing a freestanding "failure to accommodate" claim fail to fully grapple with the statutory text, structure, and history. Instead, they rely on dicta from *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977), stating that the "intent and effect" of the "religion" definition "was to make it an unlawful employment practice under [42 U.S.C. § 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of

his employees and prospective employees." Reliance on *Hardison* is misplaced.[4]

This Court did not discuss whether the employee's claim sounded in disparate treatment or disparate impact—and it did not need to. The question presented was whether adequate steps had been taken to accommodate the employee's religious observance. The Court concluded that adequate steps had been taken and, for that reason, held that there was no violation of Title VII. There was no need for the Court to elaborate further on the precise source or contours of the Title VII claim; the employee's claim would have failed under any theory.

Moreover, *Hardison* was decided long before the 1991 Act. This is significant for two reasons. First, the need to distinguish between disparate-treatment and disparate-impact claims was significantly less pressing when the same remedies were available for both. It is therefore not surprising that the Court declined to focus specifically on the nature of the statutorily defined theories of discrimination. Second, to the extent there was any ambiguity regarding the existence of an independent religious-accommodation claim, the 1991 Act dispelled it. Compensatory and

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[4] Lower courts have also relied on this Court's decision in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). But in that case, the Court expressly declined to "establish" a "proof scheme" for "religious accommodation claims . . . analogous to that developed in other Title VII contexts." *Id.* at 67. The Court focused instead on whether "the employer's proposed accommodation of [the employee's] religious practices" was sufficient. *Id.* at 68. Moreover, any dicta suggesting that the statute creates a stand-alone "failure to accommodate" claim predates the 1991 Act and cannot be reconciled with the statutory text or history for the reasons set forth above.

punitive damages are available for disparate-treatment claims, but not disparate impact; the business-necessity defense is available in a disparate-impact case, but not in a disparate-treatment case; and nothing governs the remedies for, or defenses to, an *independent* "failure to accommodate" claim under Title VII. The reason is simple: there is no such claim.

C. This Is Not Just A Matter Of Nomenclature

The theory of discrimination alleged comes with certain elements, burdens, defenses, and (critically) remedies. For example, the district court in this case granted summary judgment in favor of petitioner without "'prob[ing] the subjective intent of the employer.'" Pet. App. 109a n.5 (citation omitted). It applied a burden-shifting framework that focused solely on establishing whether respondent had offered a reasonable accommodation. *Id.* at 109a-20a & n.5. And that framework failed to identify any disparate impact in the conventional sense—*i.e.*, a differential, adverse effect on a *class* of religious applicants. Thus, without any showing of "intentional discrimination," or even a showing of adverse impact on a broader class, the district court found a Title VII violation and the jury awarded $20,000 in compensatory damages. *See Id.* at 12a; 42 U.S.C. § 1981a(a)(1). Other courts have proceeded in like fashion. *See, e.g., Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1034-35 (8th Cir. 2008) (affirming award of compensatory damages after employee proved that employer "fail[ed] to reasonably accommodate [his] religion"). The absence of doctrinal discipline has had real-world consequences for employers.

II. RELIGIOUS-ACCOMMODATION CASES LIKE THIS ONE DO NOT PRESENT DISPARATE-TREATMENT CLAIMS AND CANNOT SUPPORT DAMAGES

"Disparate-treatment cases present 'the most easily understood type of discrimination,' and occur where an employer has 'treated [a] particular person less favorably than others because of' a protected trait." *Ricci*, 557 U.S. at 577 (alteration in original) (citation omitted). The hallmark of a disparate-treatment claim is proof "'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988)); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) ("Liability in a disparate-treatment case 'depends on whether the protected trait actually motivated the employer's decision.'" (alteration in original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993))).

In theory, an employer might refuse to accommodate religion in a manner that constitutes disparate treatment. For example, an employer who is willing to accommodate an employee's request to skip a Saturday meeting for a secular reason, but who refuses a comparable request from an employee with a religious reason, may be acting with a discriminatory motive. *See also, e.g.*, *Dixon v. Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010) (application of policy specifically prohibiting the display of religious items in management offices); *Brown v. Polk Cnty.*, 61 F.3d 650 (8th Cir. 1995) (firing employee, in part, because of his religious activities), *cert. denied*, 516 U.S. 1158 (1996). Such cases fit comfortably within the disparate-

treatment framework and do not require the doctrinal gymnastics attempted by the government in this case.

However, most so-called "failure to accommodate" claims do not allege disparate treatment as that theory is traditionally understood. Take, for example, the *Hardison* case. The charge there was that the employer had applied a facially neutral and agreed-upon seniority system *equally* to employees seeking exemptions for secular reasons and employees seeking exemptions for religious reasons; the operation of that system had an adverse impact on the employee's religious observance of the Sabbath; the employer failed to alleviate that impact through reasonable accommodation; and providing such accommodation would not have caused the employer any undue hardship. *Hardison*, 432 U.S. at 76-85. There was "no suggestion of discriminatory intent." *Id.* at 82.

Other religious-accommodation cases follow a similar pattern: a neutral employment practice has an adverse impact on a particular religious observance or practice, which triggers the employer's duty to accommodate, unless it would be an undue burden. *See, e.g.*, *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449, 454 (7th Cir. 2013) (employer failed to make exception to neutral leave–and-attendance policy in order to give employee time off to attend to father's religious burial rites); *Heller*, 8 F.3d at 1436-37 (employer failed to make exception to neutral no-leave rule so that employee could attend wife's religious conversion ceremony). As in *Hardison*, no showing was made that the policies or rules were motivated by religious animus or that the employers acted with any discriminatory intent.

The EEOC has endorsed that understanding. In formal guidance that remains in effect, the EEOC explains that "[a] religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally." *EEOC Compliance Manual* § 12-IV, at 46. "An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion." *Id.* The EEOC was right then, and it is wrong now.

For the first time, the government characterizes this case as resting on a disparate-treatment theory. Pet. Br. 23-24. The change of position is not surprising: the jury in this case awarded $20,000 in compensatory damages. Pet. App. 12a. And, as discussed above, compensatory damages are available only if respondent "engaged in unlawful intentional discrimination." 42 U.S.C. § 1981a(a)(1). But recharacterizing petitioner's claim as one of disparate treatment is inconsistent with the EEOC's arguments to date, and with Title VII (*see* Part III, *infra*). The EEOC alleged that respondent did not hire Samantha Elauf "because of her failure to comply with" a facially neutral policy (*i.e.*, the "Look Policy"). EEOC MSJ 27. The EEOC never alleged, and the district court never found, that respondent acted with a discriminatory motive when it adopted the Look Policy or that it acted with a discriminatory intent when it declined to grant an exception to that policy. Indeed, the district court granted summary judgment in favor of petitioner based on a "'burden-shifting mechanism'" that admittedly did not "'probe the subjective intent of the employer,'" but instead only considered "'the reasonableness of the

accommodations offered or not offered.'" Pet. App. 109a n.5 (citation omitted). Petitioner did not prove (or attempt to prove) intentional discrimination and, for that reason alone, the district court's judgment awarding damages cannot stand.

The government does not suggest, in the alternative, that this case presents a disparate-impact claim. If it did, it would have to grapple with the fact that the method of proof it pursued below is difficult to square with the proof required to establish disparate impact (let alone the remedy). All disparate-impact claims would appear to be governed by 42 U.S.C. § 2000e-2(k), which codifies the "[b]urden of proof in disparate impact cases." In particular, petitioner would have to show that the challenged policy "causes a disparate impact" on the basis of a protected trait. *Id.* § 2000e-2(k)(1)(A)(i). As interpreted by this Court, that showing requires a demonstration that the challenged practice "'in fact fall[s] more harshly on one *group* than another.'" *Hazen Paper Co.*, 507 U.S. at 609 (quoting *Teamsters*, 431 U.S. at 335-36 n.15 (alteration in original) (emphasis added)). Thus, ordinarily, the plaintiff in a disparate-impact case "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994-95. The Court has applied this standard even when the plaintiff argues that a subjective decisionmaking process makes it difficult to come up with statistical proof of disparate impact. *Id.* at 994. Yet, the EEOC has never attempted to make such a showing in this case, or

offered an explanation as to how it could show disparate impact under Title VII without it.[5]

In the end, the statutory text, structure, and history indicate that Title VII claims come in two and only two variants: disparate treatment and disparate impact. Most religious-accommodation cases (including this one) cannot be premised on a disparate-treatment theory because no discriminatory motive is alleged. A disparate-impact theory, in contrast, requires no "[p]roof of [a] discriminatory motive." *Teamsters*, 431 U.S. at 335 n.15; *see Raytheon*, 540 U.S. at 52-53 ("'employer's subjective intent to discriminate'" is not required in disparate-impact case) (citation omitted). And the gravamen of such a claim is that a "facially neutral" employment practice is "'discriminatory in operation.'" *Ricci*, 557 U.S. at 577-78 (quoting *Griggs*, 401 U.S. at 431). That is effectively what a "failure to accommodate" case of the sort at issue here alleges and, for that reason, disparate impact is the better fit. In any event, absent proof of "intentional discrimination," there is simply no basis for awarding damages.

III. THIS COURT SHOULD NOT REDEFINE DISPARATE TREATMENT TO FIT THE GOVERNMENT'S NEW THEORY

The government's novel theory of disparate

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[5] The Court need not address the precise contours of a disparate-impact-based "accommodation" claim in this case because the only relief at issue, compensatory damages, is unavailable regardless of whether the EEOC could establish disparate impact. Moreover, given the complexities just described, the Court should be hesitant to opine on this issue in a case that does not require it to do so.

treatment departs from this Court's settled case law and would work a significant and troubling change to employment discrimination law.

Petitioner's theory of how a run-of-the-mill religious-accommodation case amounts to intentional discrimination is not entirely clear. The only definition of "intent" alluded to is borrowed from tort law and asks whether the employer "'desires to cause the consequences of his act,'" or "'believes the consequences are substantially certain to result from it.'" Pet. Br. 24 (quoting *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 n.3 (2011)). But that meaning of "intent" comes from a very different context. In *Staub*, the supervisors *had* acted with a discriminatory motive. 131 S. Ct. at 1189-94. The only question was whether the supervisor that was motivated by discriminatory animus also intended to cause the adverse employment action. *Id.* The adverse employment action was the "consequence" at issue. Here, it is undisputed that respondent intended not to hire Ms. Elauf (*i.e.*, intended the adverse employment action); the relevant question is why.

And that is where petitioner's theory runs into another hurdle. The key question in a disparate-treatment case is "whether the employer is treating" the employee or prospective employee "'less favorably'" than others because of a protected trait (here, religion). *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citation omitted). In most religious-accommodation cases, the allegation is not that the employer is treating the employees *less favorably* than others; it is that the employer is required to treat the employee *more favorably*. That, after all, is the nature of accommodation. Petitioner's

discussion ignores the critical backdrop for most accommodation cases (including this one): the existence of a neutral policy that conflicts with the employee's religious observance or practice and, thus, calls for a reasonable accommodation. *See* Pet. Br. 24; *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting) ("The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee."). The failure to grant an exception to a neutral policy may sometimes violate Title VII on a disparate-impact theory; but (without more) it does not amount to intentional discrimination.

To hold otherwise would seriously expand and distort the meaning of disparate treatment that has persisted for several decades. The Court has often described "disparate treatment" as "'the most easily understood type of discrimination.'" *Ricci*, 557 U.S. at 577 (quoting *Teamsters*, 431 U.S. at 335 n.15). No longer. If petitioner is correct, an employer could be charged with intentional discrimination (and face an accompanying demand for compensatory and punitive damages) whenever it applies a rule of general applicability that adversely impacts the religious observance or practice of an employee or prospective employee. If that were the law, the plaintiff in *Hardison*, who was terminated because he refused to report to work on Saturdays, could have argued that his employer engaged in intentional discrimination because it (somehow) treated him differently because of his religion. The plaintiff in *Adeyeye*, who was terminated after traveling to Nigeria to lead his father's burial rites after his employer denied his request for unpaid leave, could have argued that his

employer intentionally discriminated against him "because of" his religion. And so on. Nevermind that there was "no suggestion of discriminatory intent," *Hardison*, 432 U.S. at 82, in either of these cases. Disparate treatment has never been so understood, and providing the complaining party with a damages remedy that Congress did not provide is no reason to start now.

In examining the government's argument in this case, the Court should also consider that this is only one of many occasions in which the EEOC has taken an aggressive position that would open employers up to compensatory and punitive damage awards, and would push disparate-treatment claims well beyond the limits of Title VII. In *Young v. United Parcel Service, Inc.*, the government did not argue that the failure to provide an accommodation to a pregnant employee violated the disparate-impact provisions of Title VII; it argued that the employer's actions constituted disparate treatment. According to the government, "[a] policy need not explicitly mention pregnancy-related work limitations in order to be facially discriminatory under Title VII," and UPS's policy denying accommodations to *both* pregnant and non-pregnant employees because their condition occurred off the job "discriminates on its face against pregnant women." U.S. Br. 15 (Sept. 11, 2014). Likewise, in *EEOC v. Catastrophe Management Solutions*, the EEOC alleges disparate treatment and seeks punitive damages against an employer that applied a facially neutral dress policy to prohibit dreadlocks on the theory that "the people *most adversely and significantly affected* by a dreadlocks ban are

African Americans." EEOC Br. 31, No. 11-13482 (11th Cir. Sept. 22, 2014) (emphasis added).[6]

It is not difficult to understand why the EEOC would like to re-label disparate-impact claims as disparate-treatment claims. Disparate-treatment claims do not require a showing of class-wide impact, are not subject to defenses based on business necessity, and can support compensatory and punitive damages. Transforming disparate-treatment claims into disparate-impact claims would therefore give the Commission a bigger stick, which it could wield more freely. But Congress drew a distinction between disparate treatment and disparate impact for a reason. This case provides the Court with an opportunity to reaffirm that neither courts nor the EEOC can disregard that critical distinction.

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[6] *Available at* http://www.chamberlitigation.com/eeoc-v-cms.

CONCLUSION

For the foregoing reasons, and those set forth in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

KATE COMERFORD TODD
WARREN POSTMAN
U.S. CHAMBER
LITIGATION CENTER, INC.
1615 H. Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL
CENTER
1201 F Street, NW
Washington, DC 20004
(202) 406-4443

Counsel for Amicus Curiae National Federation of Independent Business Small Business Legal Center

MELISSA ARBUS SHERRY
Counsel of Record
ELANA NIGHTINGALE
DAWSON*
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
melissa.sherry@lw.com

* Admitted in Illinois only; all work supervised by a member of the DC Bar.

Counsel for Amici Curiae

JANUARY 28, 2015

No. 14-86

In the
Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS IN SUPPORT OF PETITIONER

JENIFER WICKS
Counsel of Record
Litigation Director
Council on American-Islamic Relations
453 New Jersey Ave SE
Washington, DC 20003
CivilRights@CAIR.com
(202) 488-8787

MUNIA JABBAR
400 7th St NW Suite 202
Washington, DC 20004

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Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) 21

Brown v. Polk Cnty., 61 F.3d 650 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996) 12

Conn. v. Teal, 457 U.S. 440 (1982) 20

Dixon v. Hallmark Co., 627 F.3d 849 (11th Cir. 2010) 10

Dothard v. Rawlinson, 433 U.S. 321 (1977) 20

Draper v. Logan County Pub. Library, 403 F. Supp. 2d 608 (W.D. Ky. 2003) 9, 13

EEOC v. United Galaxy, Inc., 2013 U.S. Dist. LEXIS 89200 (D.N.J. June 25, 2013) 8, 12, 15

EEOC v. UPS, 94 F.3d 314 (7th Cir. Ill. 1996) 7

EEOC v. White Lodging Servs. Corp., 2010 U.S. Dist. LEXIS 32492 (W.D. Ky. Mar. 31, 2010) 5, 12

Goldman v. Weinberger, 475 U.S. 503 (1986) 9, 17

Griggs v. Duke Power Co., 401 U.S. 424 (1971) ... 19-20

Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993) 12

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 20

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10, 20, 22

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) .. 22

Sistrunk v. Camden County Workforce Inv. Bd., No. 05-1506, 2007 U.S. Dist. LEXIS 28854 (D.N.J. Apr. 18, 2007) 8, 17

Tagore v. United States, No. H-09-0027, 2014 U.S. Dist. LEXIS 85316 (S.D. Tex. June 24, 2014) 8
Thomas v. National Ass'n of Letter Carriers, 225 F.3d 1149, 1155 (10th Cir. 2000) 10, 21
United States EEOC v. Abercrombie & Fitch Stores, Inc., 2013 U.S. Dist. LEXIS 51905 (N.D. Cal. Apr. 9, 2013) 12
Webb v. City of Philadelphia, 562 F.3d 256 (3d Cir. Pa. 2009) 5

Statutes

42 U.S.C. § 2000e-2(a)(1) 20

Legislative History

110 Cong. Rec. 13079-13080 (1964) 20
110 Cong. Rec. 7213 (1964) (interpretive memorandum of Sens. Clark and Case) 20
H.R. Rep. No. 914, 88th Cong., 1st Sess., 26 (1963) 20

Books, Articles and Other Authorities

A Correctional Institution's Guide to Islamic Religious Practices, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005), http://www.cair.com/images/pdf/correctional_institution_guide.pdf 5, 7
Alessandro Acquisti & Christina M. Fong, *An Experiment in Hiring Discrimination Via Online Social Networks* (Oct. 26, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031979 25
America's Muslim Population 2030, PEW RESEARCH CENTER (Mar. 2, 2011),

http://www.pewresearch.org/daily-number/americas-muslim-population-2030/ 27
American Attitudes Toward Arabs and Muslims, ARAB AMERICAN INSTITUTE (July 29, 2014), http://b.3cdn.net/aai/3e05a493869e6b44b0_76m6iyjon.pdf 23
Amy Gardner, *Nine Muslim Passengers Removed From Jet*, WASHINGTON POST (Jan. 2, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/01/AR2009010101932.html?hpid=topnews 15
An Educator's Guide to Islamic Religious Practices, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005), http://www.cair.com/images/pdf/educators_guide.pdf.. 5, 7
An Employer's Guide to Islamic Religious Practices, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005). https://www.cair.com/images/pdf/employers_guide.pdf. 5, 7
Bradley R.E. Wright, Michael Wallace, John Bailey, & Allen Hyde, *Religious affiliation and hiring discrimination in New England: A field experiment*, 34 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 111 (2013) 24, 25
CAIR-LA Seeks Public's Help in Identifying Man Who Attacked Muslim Woman, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 24, 2014), http://www.cair.com/press-center/press-releases/12579-help-identify-man-who-attacked-muslim-woman.html 6
CAIR-MI Calls for Hate Crime Probe of Attack on Muslim at Mall, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 21, 2014), http://www.cair.com/press-center/press-releases/12569-cair-michigan-calls-for-hate-crime-probe-of-attack-on-muslim-at-mall.html 6-7
CAIR-NY Calls for Hate Crime Probe of Attack on Muslims Outside Mosque (July 21, 2014),

http://www.cair.com/press-center/press-releases/12567-cair-ny-calls-for-hate-crime-probe-of-attack-on-muslims-outside-mosque.html 15
CAIR-NY Recommends Safety Precautions After Muslim Family Attacked by Ex-Marine, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Sep. 16, 2014), http://www.cair.com/press-center/press-releases/12651-safety-precautions-after-muslim-family-attacked-by-ex-marine.html; http://www.cair.com/press-center/press-releases/12579-help-identify-man-who-attacked-muslim-woman.html 14
Chris Caesar, *Muslim Woman Describes Assault, Harassment near Malden Center*, MALDEN PATCH (May 7, 2013), http://patch.com/massachusetts/malden/muslim-woman-assaulted-harassed-near-malden-center 6
Discrimination Against Muslim Women, ACLU WOMEN'S RIGHTS PROJECT https://www.aclu.org/sites/default/files/pdfs/womensrights/discriminationagainstmuslimwomen.pdf 6, 14, 26
EEOC v. Comair, Inc., Civil Action No. 1:05-cv-0601 (W.D. Mich. consent decree entered Nov. 2006) 8
EEOC v. Grand Central Partnership, Civil Action No. 08-8023 (S.D.N.Y. consent decree entered Aug. 2009) 8
EEOC v. LAZ Parking, LLC, Case No. 1:10-CV-1384 (N.D. Ga. consent decree entered Nov. 2010) 5
EEOC v. Pilot Travel Ctrs. LLC, Civil Action No. 2:03-0106 (M.D. Tenn. consent decree entered April 2004) 9
Gail Paschall-Brown, *Florida Girl Attacked After Wearing Hijab to School*, WESH ORLANDO (Feb. 4, 2014), http://www.wesh.com/news/central-florida/florida-girl-attacked-after-wearing-hijab-to-school/24271022 6

Growing in Faith: California Muslim Youth Experiences with Bullying, Harassment & Religious Accommodation in Schools, CAIR-CALIFORNIA 22-24 (2013) http://ca.cair.com/downloads/GrowingInFaith.pdf 14
How Americans Feel About Religious Groups, PEW RESEARCH CENTER (July 16, 2014), http://www.pewforum.org/files/2014/07/Views-of-Religious-Groups-09-22-final.pdf 23
Lawrence Transportation Systems, Civil Action No. 5:10CV 97 (W.D. Va. consent decree entered August 2011) 9
Lisa De Bode, *Sikh professor attacked in New York in alleged hate crime*, AL JAZEERA AMERICA (Sep. 23, 2014), http://america.aljazeera.com/articles/2013/9/23/columbia-universityprofessorattackedinallegedhatecrime.html 16
Lisa Fernandez, *Sunnyvale: Man attacked for being Muslim, public safety officers say*, SAN JOSE MERCURY NEWS (Jun. 14, 2010), http://www.mercurynews.com/breaking-news/ci_15295575?nclick_check=1 15
Louise Cainkar, *No longer invisible: Arab and Muslim exclusion after September 11*, 224 MIDDLE EAST REPORT (2002). 24
Michael Wallace, Bradley R.E. Wright, & Allen Hyde, *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, 1(2) SOCIAL CURRENTS 189 (2014) 24, 25
Muslim Americans: No Signs in Growth of Alienation or Support for Extremism, PEW RESEARCH CENTER (Sep. 1, 2011), http://www.pewresearch.org/daily-number/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/ 6, 13, 18, 27

Muslim Correctional Officer Wins Right to Wear Beard, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 13, 2012) 7
Muslim group: two imams pulled from plane bound for North Carolina, CNN (May 7, 2011), http://www.cnn.com/2011/TRAVEL/05/07/muslims.kicked.off.plane/ 15
Peter Gottschalk & Gabrial Greenberg, *Making Muslims the enemy. Behind the backlash: Muslim Americans after 9/11*, TEMPLE UNIV. PRESS (2008) 24
Religion-Based Charges Filed from 10/01/2000 through 9/30/2011 Showing Percentage Filed on the Basis of Religion-Muslim, U.S. EQUAL EMPLOYMENT OPPORTUNITY http://www.eeoc.gov/eeoc/events/9-11-11_religion_charges.cfm 27
Sonia Ghumman & Ann Marie Ryan, *Not welcome here: Discrimination towards women who wear the Muslim headscarf* 66 HUMAN RELATIONS 5 (2013) 13, 14, 26
Sonia Ghumman & Linda Jackson, *The downside of religious attire: The Muslim headscarf and expectations of obtaining employment*, 31 J. ORGANIZ. BEHAV. 4 (2010) 13
Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, NEW YORK TIMES (Sep. 23, 2010), http://www.nytimes.com/2010/09/24/business/24muslim.html?pagewanted=all&_r=0 26
THE QURAN. Trans. by Muhammad Asad. London: The Book Foundation, 2003 4
Turban Myths, SOUTH ASIAN LEGAL DEFENSE FUND at 9 (Sep. 9, 2013),

http://issuu.com/saldefmedia/docs/turbanmyths_121113 ..... 15, 16
U.S. Religious Landscape Survey. Religious Affiliation: Diverse and Dynamic, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Feb. 2008), religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf 4
U.S. v. Washington Metro. Area Transit Auth., No. 1:08-CV-01661 (RMC) 5, 7
United States v. New York State Dep't of Corr. Servs., Civil Action No. 07-2243 (S.D.N.Y. consent decree entered Jan. 2008) 9

INTEREST OF THE AMICUS CURIAE

The Council on American-Islamic Relations (CAIR)[1] is the largest American Muslim civil rights organization in the country, dedicated to protecting the civil rights and liberties of all Americans by defending the United States Constitution and anti-discrimination laws. CAIR also engages in public advocacy to promote a greater understanding of Islam among the American public and policymakers. CAIR is particularly concerned with this case because it receives a significant number of employment discrimination complaints from the American Muslim community. In fact, this case arises out of a complaint initially filed by CAIR's Oklahoma chapter with the Equal Employment Opportunity Commission on behalf of Samantha Elauf, the Muslim job applicant who was denied employment because she wears a religious headscarf (also referred to as a "hijab"). CAIR believes this brief can offer the Court unique insight into the lives of American Muslims and the challenges they face in achieving equality in American public life, including in the workplace.

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[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief and their letters of consent have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, CAIR states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission.

In this case, the Court has been asked to resolve legal issues that profoundly affect the ability of individuals who outwardly manifest their religion to obtain and secure employment. Although many Muslims display their Islamic faith through various dress and grooming practices, this is not an issue limited to one particular religion; many followers of several other faiths, such as Judaism and Sikhism, follow their respective religiously-motivated dress and grooming practices. Title VII of the Civil Rights Act of 1964 ensures equality of employment opportunities by prohibiting discrimination on the basis of religion. Because an applicant's religious views, and the need for the accommodation thereof, should not be any part of the basis for an employment decision, CAIR supports the position of the Petitioner and requests that the Court reverse the Tenth Circuit's decision requiring that a job applicant or employee provide direct, explicit notice of their religious observance or practice to trigger fundamental protections under Title VII.

SUMMARY OF ARGUMENT

Religiously-motivated dress and grooming practices are both widespread and deeply embedded within the American Muslim community. Muslim women who wear a hijab are following what they believe to be God's command to be modest in their dress. The distinctive manner in which many wear a hijab, tightly covering their hair and neck, make the wearer readily identifiable as Muslim. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals because of their religion and imposes an obligation on employers to

reasonably accommodate the religious practices of an employee or job applicant. In doing so, Title VII ensures that an individual is not unnecessarily forced to compromise his or her religious beliefs in order to participate in the labor force and earn a livelihood.

This Court should reject the explicit notice rule because it places unreasonable burdens on individual job candidates and employees who outwardly display their religion through dress and grooming practices. Contrary to the underlying assumption upon which the explicit notice rule rests, it is employers, rather than potential employees, who are intimately familiar with their own workplaces and policies, and therefore are often better able to predict a need for a dress or grooming-based religious accommodation. Worse, the explicit notice rule would actually operate counter to the purpose of Title VII by permitting discrimination. This troubling outcome stems directly from the application of the explicit notice rule itself, which allows employers to refuse to hire those who, unaware of their rights or the nature of the workplace and employer policies, do not know that they must expressly request an accommodation, even when the employer acts out of animus towards the applicant. Because the explicit notice rule would perpetuate employment discrimination on the basis of religion, it will ultimately compound existing socioeconomic hardships that religious minority communities face.

BACKGROUND

The Tenth Circuit's ruling requiring explicit, upfront notice of an employee's religious beliefs allows employers to "weed out" religious job candidates at a vulnerable stage: before they are hired. This "explicit notice rule" has a particularly detrimental effect on workers who follow religious dress and grooming standards. Given America's broad religious diversity,[2] the explicit notice rule would negatively impact a wide range of job applicants and employees whose physical appearance reveals their religious affiliation.

As the facts of this case make clear, Muslim women are particularly vulnerable to discrimination under the explicit notice rule. Modesty is a deeply-embedded concept in Islam that is mandated upon both men and women.[3] Accordingly, as an outward

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[2] *U.S. Religious Landscape Survey. Religious Affiliation: Diverse and Dynamic*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Feb. 2008), religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf

[3] *See, e.g.*, THE QURAN. 24:30. Trans. by Muhammad Asad. London: The Book Foundation, 2003. ("Say to the believing men to lower their gaze and to be mindful of their chastity: this will be most conducive to their purity – [and,] verily, God is aware of all that they do."); *id.* at 24:31. ("And tell the believing women to lower their gaze and to be mindful of their chastity, and not to display their charms [in public] beyond what may [decently] be apparent thereof; hence, let them draw their head-coverings over their bosoms."); *id.* at 33:59. ("O Prophet! Tell thy wives and thy daughters, as well as all [other] believing women, that they should draw over themselves some of their outer garments [when in public]: this will be more conducive to their being recognized [as decent women] and not annoyed.").

manifestation of their faith, many Muslim women wear a headscarf, often referred to as a "hijab."[4] The distinctive and unifying feature of the hijab is that it covers the wearer's hair, and it also often covers the neck or upper body.[5] For some women, their hijab also encompasses a face veil, loose-fitting clothing generally, or specifically wearing skirts instead of pants.[6] Over half of American Muslim women wear

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[4] *An Employer's Guide to Islamic Religious Practices*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005). https://www.cair.com/images/pdf/employers_guide.pdf. *See also An Educator's Guide to Islamic Religious Practices*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005), http://www.cair.com/images/pdf/educators_guide.pdf (the hijab headscarf is also known as a "khimar"). This brief will exclusively use the term "hijab" to refer to a headscarf that a Muslim woman wears as required by her religious beliefs.

[5] *An Employer's Guide to Islamic Religious Practices*, supra note 4; *A Correctional Institution's Guide to Islamic Religious Practices*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (2005), http://www.cair.com/images/pdf/correctional_institution_guide.pdf. *See also EEOC v. White Lodging Servs. Corp.*, 2010 U.S. Dist. LEXIS 32492 at *3 (W.D. Ky. Mar. 31, 2010); *Webb v. City of Philadelphia*, 562 F.3d 256, 258 (3d Cir. Pa. 2009).

[6] *An Employer's Guide to Islamic Religious Practices*, supra note 4; *U.S. v. Washington Metro. Area Transit Auth.*, No. 1:08-CV-01661 (RMC) (D.D.C. consent decree entered Feb. 2009) (lawsuit filed and settled on behalf of city bus driver applicants and employees who were denied religious accommodation to wear skirts instead of pants, and to wear religious head coverings); *EEOC v. LAZ Parking, LLC*, Case No. 1:10-CV-1384 (N.D. Ga. consent decree entered Nov. 2010) (settlement on behalf of Muslim parking facility employee who was terminated for refusing to remove her hijab).

a hijab headscarf in accordance with their faith.[7] Muslim women are especially susceptible to an increase in workplace discrimination under any legal rule that scales back their rights. Not only have studies demonstrated that women wearing hijabs are subject to increased employment discrimination,[8] but many of these women face a hostile sociocultural environment and are subject to harassment, and even physical attacks, merely for wearing their hijabs.[9]

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[7] *Muslim Americans: No Signs in Growth of Alienation or Support for Extremism*, PEW RESEARCH CENTER (Sep. 1, 2011), http://www.pewresearch.org/daily-number/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/

[8] *Discrimination Against Muslim Women*, ACLU WOMEN'S RIGHTS PROJECT https://www.aclu.org/sites/default/files/pdfs/womensrights/discriminationagainstmuslimwomen.pdf

[9] *See, e.g.*, Chris Caesar, *Muslim Woman Describes Assault, Harassment near Malden Center*, MALDEN PATCH (May 7, 2013), http://patch.com/massachusetts/malden/muslim-woman-assaulted-harassed-near-malden-center (Muslim woman in Boston area wearing a hijab attacked by stranger on the street, who identified her as Muslim); Gail Paschall-Brown, *Florida Girl Attacked After Wearing Hijab to School*, WESH ORLANDO (Feb. 4, 2014), http://www.wesh.com/news/central-florida/florida-girl-attacked-after-wearing-hijab-to-school/24271022 (Florida schoolgirl repeatedly attacked after she began wearing a hijab to school); *CAIR-LA Seeks Public's Help in Identifying Man Who Attacked Muslim Woman*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 24, 2014), http://www.cair.com/press-center/press-releases/12579-help-identify-man-who-attacked-muslim-woman.html (hate crime in which the assailant grabbed the woman's hijab while calling it a "hijab"); *CAIR-MI Calls for Hate Crime Probe of Attack on Muslim at Mall*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS

It is not only Muslim women like Ms. Elauf who would be harmed by the explicit notice rule. In accordance with their religious beliefs, many Muslim men wear beards,[10] skullcaps (commonly referred to as "kufis"),[11] or follow an Islamic mandate to remain well-covered from their navel to their knees to guard their modesty.[12] CAIR frequently receives complaints from men whose employers prohibit them from growing or maintaining beards in accordance with their religious beliefs.[13]

(July 21, 2014), http://www.cair.com/press-center/press-releases/12569-cair-michigan-calls-for-hate-crime-probe-of-attack-on-muslim-at-mall.html.

[10] *An Employer's Guide to Islamic Religious Practices*, supra note 4.

[11] *Id.*; *see also, An Educator's Guide to Islamic Religious Practices*, supra note 4. *See, generally, U.S. v. Washington Metro. Area Transit Auth.*, No. 1:08-CV-01661 (RMC) (D.D.C. consent decree entered Feb. 2009) (lawsuit filed and settled on behalf of city bus driver applicants and employees who were denied religious accommodation to wear skirts instead of pants and to wear religious head coverings); *EEOC v. UPS*, 94 F.3d 314 (7th Cir. Ill. 1996) (EEOC lawsuit on behalf of a Muslim employee at UPS challenging a policy that prohibits beards may not be worn by its employees working in public contact positions).

[12] *See, e.g., An Educator's Guide to Islamic Religious Practices*, supra note 4; *A Correctional Institution's guide to Islamic Religious Practices*, supra note 5.

[13] *See, e.g., Muslim Correctional Officer Wins Right to Wear Beard*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 13, 2012), https://www.cair.com/action-alerts/177-muslim-correctional-officer-wins-right-to-wear-beard.html

Beyond the Muslim community, the explicit notice rule would also impact a broad swathe of religious communities that are marked by distinctive dress or grooming practices. Sikh Americans have encountered challenges to employment based on their required religious grooming and dress, such as wearing turbans and beards for men and carrying dulled ceremonial swords called kirpans for men and women.[14] Similarly, conflicts involving religiously-motivated grooming and employment policies have also arisen with Rastafarian workers whose religion forbids them from cutting their hair,[15] Messianic

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[14] *See, e.g., EEOC v. United Galaxy, Inc.*, 2013 U.S. Dist. LEXIS 89200 (D.N.J. June 25, 2013) (EEOC lawsuit against auto-dealership on behalf of a qualified Sikh applicant alleging that company refused to hire and grant him a reasonable accommodation because of his turban and refusal to shave his beard, which is required by his faith); *Tagore v. United States*, No. H-09-0027, 2014 U.S. Dist. LEXIS 85316 at *2-3 (S.D. Tex. June 24, 2014) (denying motion to dismiss in case where employer forbade female Sikh employee from wearing her religiously-mandated kirpan blade to work).

[15] *See, e.g., Sistrunk v. Camden County Workforce Inv. Bd.*, No. 05-1506, 2007 U.S. Dist. LEXIS 28854, at *4 (D.N.J. Apr. 18, 2007) (denying summary judgment on the grounds of lack of notice of religious conflict where Rastafarian plaintiff mentioned to his supervisor that he could not cut his hair because of his "way of life."); *EEOC v. Comair, Inc.*, Civil Action No. 1:05-cv-0601 (W.D. Mich. consent decree entered Nov. 2006) (settlement on behalf of Rastafarian airline applicant alleging he was not hired because he refused to cut his hair to conform with the company's grooming standards); *EEOC v. Grand Central Partnership*, Civil Action No. 08-8023 (S.D.N.Y. consent decree entered Aug. 2009) (settlement, along with policy and procedure changes and related training, in case alleging failure to accommodate long dreadlocks and short beards worn

Christian job applicants and employees whose religion requires them to grow beards,[16] Jewish employees who wear yarmulke skullcaps,[17] and Christian employees who wear crosses as outward manifestations of their faith.[18]

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pursuant to Rastafarian religious practice by workers performing sanitation, maintenance and public safety duties); *Lawrence Transportation Systems*, Civil Action No. 5:10CV 97 (W.D. Va. consent decree entered August 2011) (settlement on behalf of applicant for storage company loading position who alleged he was not hired due to his Rastafarian dreadlocks).

[16] *EEOC v. Pilot Travel Ctrs. LLC*, Civil Action No. 2:03-0106 (M.D. Tenn. consent decree entered April 2004) (settlement on behalf of Messianic Christian maintenance worker who wore beard as part of his religious practice, and was terminated for refusing to shave in compliance with employer's no-beard policy).

[17] *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Jewish Orthodox member of the U.S. Air Force challenged a regulation that prohibited him from wearing a yarmulke while on duty alleging violations under the Free Exercise Clause of the First Amendment); *See also, United States v. New York State Dep't of Corr. Servs.*, Civil Action No. 07-2243 (S.D.N.Y. consent decree entered Jan. 2008) (settlement of case brought by U.S. Department of Justice, providing for individualized review of correctional officers' accommodation requests with respect to uniform and grooming requirements, and allowing employees to wear religious skullcaps such as kufis or yarmulkes if close fitting and solid dark blue or black in color, provided no undue hardship was posed).

[18] *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (W.D. Ky. 2003) (public librarian brought First Amendment free speech and free exercise claims against employer after she was fired for wearing a cross on her necklace in violation of the library's dress code).

The explicit notice rule impedes the employment of those who, as in the aforementioned examples, manifest their religious beliefs through dress and grooming practices. It permits an employer to decline to hire or to fire a religious worker based entirely on their religious appearance, motivated by anti-religious animus, simply because the religious worker is unaware that their beliefs potentially conflict with workplace policy.

ARGUMENT

I. THE EXPLICIT NOTICE RULE RESTS UPON THE INCORRECT ASSUMPTION THAT ONLY JOB CANDIDATES AND EMPLOYEES HAVE REASON TO KNOW OF A NEED FOR A RELIGIOUS ACCOMMODATION.

To establish a prima facie case for a religion-based failure to hire claim, a plaintiff must allege that: 1) the applicant's religious belief conflicted with a job requirement; 2) the employee notified the employer of the religious belief; and 3) the employer declined to hire for failing to satisfy the job requirement. *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013); *Dixon v. Hallmark Co.*, 627 F.3d 849, 855 (11th Cir. 2010). With respect to the notice requirement, the Tenth Circuit is the only appeals court to have instituted an "explicit notice rule" requiring the applicant to give explicit verbal notice of a religious accommodation conflict. App. at 28a. Under this rule, even if the employer receives

notice of the conflict from a source other than the candidate's explicit statement, the plaintiff's prima facie notice requirement is not satisfied. *Id.* at 30a.

In adopting the explicit notice rule, the Tenth Circuit relied on the underlying assumption that employees and job candidates are far more likely than employers to be able to predict a possible conflict between their religious practice and workplace policies. App., 46a-53a. The Court went so far as to conclude that the facts giving rise to a need for a Title VII religious accommodation "ordinarily are only within the ken of the applicant or employee." App., 46a. This assumption distorts and fails to take into account essential facts, especially where the religious accommodation is for dress or grooming practices. The general American public, including employers, can identify many religious dress standards. In contrast, however, job applicants are generally not aware of employer policies that may conflict with their religious practice. This is further exacerbated in the American Muslim community, which is largely comprised of recent immigrants and youths who have little U.S. job market experience that can signal to them the possible need for accommodation.

Employers are necessarily better situated to predict a need for religious accommodation than either job applicants or employees. Based on these underlying realities, the explicit notice rule should be rejected and this Court should instead adopt the majority circuit standard. Under the majority standard, an employer has an obligation to offer a reasonable religious accommodation where they have

"enough information" about an employee's need for religious accommodation from *any* source to allow them to "understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993). The majority circuit approach allocates the burden among applicants and employers more fairly and consistent with the realities of the job market.

A. Employers are often on notice of a job candidate's need for religious accommodation because they can visually identify types of religious grooming and dress.

The Tenth Circuit was incorrect to assume that only employees and job candidates are able to know whether there is a possible religion-work policy conflict. In reality, employers can visually identify religious dress and grooming, thus putting them on notice of the need for accommodation.[19] Therefore,

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[19] *See, e.g.*, App. at 7a-9a (describing Abercrombie assistant manager's recognition of Petitioner's hijab); *United States EEOC v. Abercrombie & Fitch Stores, Inc.*, 2013 U.S. Dist. LEXIS 51905, at *10 (N.D. Cal. Apr. 9, 2013) (describing interviewer's recognition of applicant's hijab as marking her as Muslim); *EEOC v. United Galaxy, Inc.*, 2013 U.S. Dist. LEXIS 89200 at *2 (D.N.J. June 25, 2013) (describing employer's recognition of plaintiff's turban by asking if he was Sikh); *EEOC v. White Lodging Servs. Corp.*, 2010 U.S. Dist. LEXIS 32492 (W.D. Ky. Mar. 31, 2010) (explaining that interviewer recognized hijab and its significance because of prior

even in the absence of explicit notice, employers often have reason to know of a need for a dress or grooming-based religious accommodation.

For example, as in this case, employers widely understand that a Muslim woman's hijab is worn for religious reasons. Hijab use is widespread in the United States; thirty-six percent of Muslim women wear a hijab all of the time and an additional twenty-four percent wear it most or some of the time.[20] Researchers in the United States have found that when using standardized photographs of women wearing hijabs, well over 90% of respondents were able to correctly identify them as Muslim.[21] The hijab's recognizability is further evidenced by the numerous incidences of women being attacked by strangers because they are wearing a hijab as an act

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conversations with another Muslim employee); *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608, 611 (W.D. Ky. 2003) (describing employer's recognition of plaintiff's cross necklace as a religious symbol).

[20] *Muslim Americans: No Signs in Growth of Alienation or Support for Extremism*, *supra* note 7.

[21] Sonia Ghumman & Ann Marie Ryan, *Not welcome here: Discrimination towards women who wear the Muslim headscarf* 66 HUMAN RELATIONS 5, 671-698 (2013); *See also*, Sonia Ghumman & Linda Jackson, *The downside of religious attire: The Muslim headscarf and expectations of obtaining employment*, 31 J. ORGANIZ. BEHAV. 4, 5 (2010) ("... Muslim women living in America who wear the hijab (headscarf) [are] an example of a group whose religious attire is a salient characteristic of their physical appearance."); *id.* at 6-7 (explaining women in hijab's status at stigmatized group in workplace).

of anti-Muslim bias.[22] In the employment context, Muslim women who wear hijabs are more likely to face discrimination; one study shows that 69% of hijab-wearing women have faced discrimination, as opposed to 29% of non-hijab wearing women.[23] Another study has found that wearing a job applicant's wearing a hijab is associated with less employer interest in hiring and less frequent permission to apply for a job.[24] Muslim girls wearing hijab get bullied at school because of their hijab, and, in some cases, instructors even engage in harassment.[25]

Besides hijab, other religious dress and grooming standards are widely recognizable by the public. On more than one occasion, Muslim men have been taken off airplanes after other passengers expressed discomfort at their being clad in Muslim

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[22] *See, supra* note 9. *See also, CAIR-NY Recommends Safety Precautions After Muslim Family Attacked by Ex-Marine*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Sep. 16, 2014), http://www.cair.com/press-center/press-releases/12651-safety-precautions-after-muslim-family-attacked-by-ex-marine.html; http://www.cair.com/press-center/press-releases/12579-help-identify-man-who-attacked-muslim-woman.html (hate crime in which the assailant grabbed the woman's hijab while calling it a "hijab").

[23] ACLU WOMEN'S RIGHTS PROJECT, *supra* note 8.

[24] Ghumman & Ryan, *supra* note 21.

[25] ACLU WOMEN'S RIGHTS PROJECT, *supra* note 8. *See also, Growing in Faith: California Muslim Youth Experiences with Bullying, Harassment & Religious Accommodation in Schools*, CAIR-CALIFORNIA 22-24 (2013) http://ca.cair.com/downloads/GrowingInFaith.pdf.

attire and grooming, such as beards.[26] Muslim men have also been subjected to anti-Muslim attacks after being identified as Muslim by religious clothing such as kufi skullcaps.[27] Sikh turbans are also widely recognizable.[28] There is a measurable bias against turbans themselves, even amongst people with

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[26] *See, e.g., Muslim group: two imams pulled from plane bound for North Carolina*, CNN (May 7, 2011), http://www.cnn.com/2011/TRAVEL/05/07/muslims.kicked.off.plane/; Amy Gardner, *Nine Muslim Passengers Removed From Jet*, WASHINGTON POST (Jan. 2, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/01/AR2009010101932.html?hpid=topnews (detailing incident where nine Muslims pulled off plane, who believed it was because of their headscarves and beards).

[27] *E.g., CAIR-NY Calls for Hate Crime Probe of Attack on Muslims Outside Mosque* (July 21, 2014), http://www.cair.com/press-center/press-releases/12567-cair-ny-calls-for-hate-crime-probe-of-attack-on-muslims-outside-mosque.html; *see also* Lisa Fernandez, *Sunnyvale: Man attacked for being Muslim, public safety officers say*, SAN JOSE MERCURY NEWS (Jun. 14, 2010), http://www.mercurynews.com/breaking-news/ci_15295575?nclick_check=1.

[28] *E.g. EEOC v. United Galaxy, Inc.*, 2013 U.S. Dist. LEXIS 89200 (D.N.J. June 25, 2013) (employee's prominent beard and turban helped put his employer on notice that he was Sikh and that there may be a religion-work conflict). Even where people cannot identify a turban as a Sikh article of faith, they can identify it as a required religious practice for the wearer. One report found that half of the public mistakenly associates a Sikh turban with Islam. *See Turban Myths*, SOUTH ASIAN LEGAL DEFENSE FUND at 9 (Sep. 9, 2013), http://issuu.com/saldefmedia/docs/turbanmyths_121113.

knowledge of Sikhism.[29] And examples of animus against turbaned Sikhs have become very common.[30]

Thus, it is evident that certain religious dress standards, such as hijabs for Muslims women, are widely recognizable by the American public, including employers. Therefore, imposing the explicit notice requirement on employees and job candidates merely allows employers to legally discriminate against religious employees and job candidates who signal their faith through dress or grooming by exploiting the explicit notice loophole. If this Court were to adopt the rule, it would lead to decreased hiring of those minority religious populations marked by distinctive dress and grooming practices.

B. Job candidates often have no reason to suspect a need for a religious accommodation, especially those applicants who are recent immigrants or youth.

The Tenth Circuit also erred in assuming that employers do not have reason to know of a need for religious accommodation because it is employers, not

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[29] See SOUTH ASIAN LEGAL DEFENSE FUND, supra note 28 at 9; http://america.aljazeera.com/articles/2014/3/13/a-go-home-terroristasikhchildrenbulliedtwicenationalaverage.html (noting that Sikh children are bullied at twice the national average).

[30] Lisa De Bode, *Sikh professor attacked in New York in alleged hate crime*, AL JAZEERA AMERICA (Sep. 23, 2014), http://america.aljazeera.com/articles/2013/9/23/columbia-universityprofessorattackedinallegedhatecrime.html.

employees, who have superior knowledge of workplace policies. In fact, job candidates frequently will not have any information about internal workplace policies, including safety and uniform standards, which may conflict with their religious beliefs or dress and grooming practices. Employers often do not inform job applicants (and sometimes, even their existing employees) about workplace policies.[31] On the contrary, as in this case, they are buried in workplace manuals or posted for existing employees and are not available to job applicants until they are hired. *See* 29 CFR 1903.2 (Occupational Safety and Health Act Regulation requiring only that its OSHA rights poster be posted for employees).

This problem is particularly acute in the American Muslim community, a large proportion of which is composed of people who have little to no prior experience attempting to find work in the United States. A significant portion of American Muslims are recent immigrants who are not familiar with employer practices, and these populations are much less likely than employers to predict the need for religious accommodation. There are 1.8 million

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[31] *See, e.g.*, *Sistrunk v. Camden County Workforce Inv. Bd.*, No. 05-1506, 2007 U.S. Dist. LEXIS 28854, at *2-3 (D.N.J. Apr. 18, 2007) (noting that employer did not notify Rastafarian job applicant, who wore long hair in accordance with his religious beliefs, of workplace policies until after he had been hired and showed up for first day of work); *Goldman v. Weinberger*, 475 U.S. 503, 505 (1986) (noting that Jewish employee who wore yarmulke was not notified it violated workplace policy for eight years).

Muslim adults in America, and 2.75 million Muslims total.[32] Sixty-three percent of American Muslims are foreign born, and a quarter of American Muslims arrived in America in the last decade.[33] In recent years, an estimated 80,000 to 90,000 new Muslim immigrants have entered the United States each year.[34] In addition, 36 percent of American Muslims are in the 18-29 age group.[35]

The significant portion of the Muslim population which has recently settled in the United States from Muslim-majority countries[36] would likely have no basis to recognize that their religious grooming may conflict with the types of uniform or safety policies that are common in American workplaces. There is also a significant Muslim youth population entering the American workforce for the first time that does not understand the possibility of a religious accommodation conflict when applying for jobs. Additionally, those who are entering the job market for the first time have not previously been exposed to company "image" or "look" policies or to American safety standards under OSHA or state worker safety laws. These groups are particularly inexperienced in the U.S. job market, and are thus even less likely to be able to predict that an

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[32] *No Signs in Growth of Alienation or Support for Extremism*, *supra* note 7 at 8.

[33] *Id.*

[34] *Id.* at 20.

[35] *Id.* at 15.

[36] *See id.* at 8, 13-14.

employer's workplace policies that may conflict with their religious beliefs.

These demographic realities highlight the fact that the Tenth Circuit's assumption that only employees can predict a need for a religious accommodation is particularly unfounded. Contrary to this assumption, employees should not be presumed to have better knowledge about potential conflicts with workplace policies than employers. It is unfair to place the burden on these members of the workforce to understand conflicts of which they are unaware and to place them in the uncomfortable position of constantly proclaiming their need for accommodation.

II. THE EXPLICIT NOTICE RULE ALLOWS EMPLOYERS TO CIRCUMVENT TITLE VII PROTECTIONS AND DENY EMPLOYMENT OPPORTUNITIES BASED ON THE APPEARANCE OF INDIVIDUALS WHO VISIBLY MANIFEST THEIR RELIGION.

By permitting employers to refuse to hire an applicant (or discharge an employee) based entirely on perceived religious beliefs and practices, the explicit notice rule would, if adopted by this Court, provide a loophole for employers to circumvent core Title VII protections and impermissibly discriminate against on the basis of religion. Such troubling results directly contravene both the letter and intent of Title VII.

The fundamental purpose of Title VII of the Civil Rights Act of 1964 is reflected in the plain language of the statute. *Griggs v. Duke Power Co.*,

401 U.S. 424, 429 (1971). Under Title VII, it is unlawful for employers "to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In enacting Title VII, Congress sought to achieve "equality of employment opportunities" and eliminate discriminatory employment practices. *Griggs*, 401 U.S. at 429; *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 355, n.15 (1977). Accordingly, this Court has repeatedly emphasized that Congress intended to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs*, 401 U.S. at 431; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973); *Dothard v. Rawlinson*, 433 U.S. 321, 328 (1977); *Conn. v. Teal*, 457 U.S. 440, 448-49 (1982). Title VII's legislative history also affirms that Congress hoped to promote hiring on the basis of qualifications of the applicant or employee, rather than on the basis of any of the five enumerated attributes. [37] Moreover, in the context of Title VII's religious accommodation provision, courts

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[37] *See* H.R. Rep. No. 914, 88th Cong., 1st Sess., 26 (1963). *See also* 110 Cong. Rec. 13079-13080 (1964) (remarks of Sen. Clark). 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Sens. Clark and Case) ("discrimination is prohibited as to any individual"); *id.*, at 8921 (remarks of Sen. Williams) ("Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job").

have recognized that both its statutory framework and legislative history promote an interactive process, in which "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (citing *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-46 (CA5 1982); *see also Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000).

The explicit notice rule, however, eschews "bilateral cooperation" and allows employers to simply refuse to employ those whose appearance reveals what otherwise would be their private religious beliefs if they fail to expressly inject their religion into the employment process. Worse, by requiring applicants to request specific religious accommodations, the rule makes the burden they would impose on employers an element of the employment decision, thereby saddling the religious applicant with baggage that other applicants do not have.

Consistent with the rule for visually apparent classifications such as race, gender and ethnicity, religious dress and grooming should never become a barrier to employment. However, under the explicit notice rule, if the employer has correctly identified a job candidate or employee's religion by reference to his or her visual appearance, they are free to discriminate against them if the employee does not have the knowledge that he or she must expressly invoke his or her rights. This gap in protection under

the law would allow employers who are inclined to discriminate against their employees or job candidates to do so without any legal repercussions. This is not a hypothetical shortcoming; Abercrombie's failure to hire Ms. Elauf here is an example of the explicit notice rule's underlying flaws: an employer may refuse to hire an individual applicant based solely on that applicant's religiously identifiable appearance. Such a perverse outcome directly conflicts with this Court's central recognition that Title VII does not tolerate even indirect or subtle discrimination based on the statute's enumerated attributes, such as race or gender. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989); *McDonnell Douglass Corp.*, 411 U.S., at 801. Thus, in allowing an employer to take religion into account when making an employment decision, the explicit notice rule defies Title VII's overarching objective of eradicating discrimination by ensuring that "sex, race, religion, and national origin *are not relevant* to the selection, evaluation, or compensation of employees." *See Price Waterhouse*, 490 U.S. at 239 (emphasis added).

Moreover, an employer may make such a decision even when the applicant or employee is unaware that a potential religion-work conflict exists. Taking advantage of its superior knowledge of its own particular policies and workplace demands, an employer may take adverse actions against job applicants or employees if they fail to make a request that they do not know they need to make. This imbalance of power directly results from the application of the explicit notice rule. If adopted by this Court, it would undermine Title VII's core

principle of equal access to work for all, without regard to religious differences.

III. THE EXPLICIT NOTICE RULE WILL ADD TO THE EXISTING EMPLOYMENT DISCRIMINATION AND CHALLENGES FACED BY RELIGIOUS EMPLOYEES AND JOB APPLICANTS, PARTICULARLY MUSLIMS.

As explained in Section II, the explicit notice rule will lead to increased terminations and failures to hire of job applicants who are religious, ultimately leading to increased socioeconomic hardship for religious minority communities. The risk of increased unemployment is particularly high for religious minorities who can be visually identified by unique religiously-mandated grooming and dress standards because the explicit notice rule would allow more employers to engage in facial discrimination against religious employees and applicants without any legal consequences. Such results are deeply troubling because religious employees and applicants already face disproportionate obstacles in the job market. The effects will be particularly negative for the American Muslim community. The significant levels of anti-Muslim bias prevalent in the United States[38] are

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[38] *See How Americans Feel About Religious Groups*, PEW RESEARCH CENTER (July 16, 2014), at 1-2, http://www.pewforum.org/files/2014/07/Views-of-Religious-Groups-09-22-final.pdf (showing that, among eight different religious groups, American public has coldest feelings towards Muslims); *American Attitudes Toward Arabs and Muslims*, ARAB AMERICAN INSTITUTE at 3 (July 29, 2014), http://b.3cdn.net/aai/3e05a493869e6b44b0_76m6iyjon.pdf

manifested in underemployment and high rates of employment discrimination. This would only be exacerbated by the explicit notice rule.

There is evidence that simply learning that a job candidate has a religious affiliation deters employers from giving them a second look. Two studies have shown that job candidates with any religious affiliation betrayed on their resume are about a quarter less likely to receive a job interview callback by phone than candidates with no apparent religious affiliation.[39] The result is even more extreme for job candidates belonging to particular minority groups. In New England, Catholics are 29% less likely to get a phone callback, and Muslims are 25% less likely to get a callback by either phone or

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(noting that only 27% of Americans have a favorable view of Muslims in 2014). *See also* Louise Cainkar, *No longer invisible: Arab and Muslim exclusion after September 11*, 224 MIDDLE EAST REPORT, 22-29 (2002). *See also*, Peter Gottschalk & Gabriel Greenberg, MAKING MUSLIMS THE ENEMY. BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11 (Rowman & Littlefield, 2008).

[39] *See, e.g.*, Bradley R.E. Wright, Michael Wallace, John Bailey, & Allen Hyde, *Religious affiliation and hiring discrimination in New England: A field experiment*, 34 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 111, 119 (2013) (showing that religious candidates are 24% less likely to receive a phone callback); Michael Wallace, Bradley R.E. Wright, & Allen Hyde, *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, 1(2) SOCIAL CURRENTS 189, 198 (2014) (showing that religious candidates are 26% less likely to get either a phone or an email callback, and that they are 30% less likely to get a phone callback).

email.[40] And in the South, Muslims, Catholics, and atheists receive significantly fewer callbacks than other religious groups.[41] Unfortunately, the explicit notice rule gives employers infected with this kind of animus against those with disfavored minority religious views room to discriminate against employees and job candidates who outwardly signal their religion.

Several studies have demonstrated the unique obstacles faced by Muslim job candidates. One study has shown that if a job candidate can be identified as Muslim on social media, they are significantly less likely to receive a callback than a Christian job candidate in certain states.[42] A similar study found an even larger detrimental effect on callbacks for Muslim job candidates.[43] In addition, as previously discussed, Muslim women wearing a hijab are also

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[40] *Religious affiliation and hiring discrimination in New England: A field experiment, supra* note 39. In fact, the study also notes that if rote responses by employers are reclassified as non-responses by employers, Muslim job candidates are 47% less likely to get phone callbacks than other candidates. *Id.* at 120.

[41] *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment, supra* note 39 at 198-200 (showing that religious candidates are 26% less likely to get either a phone or an email callback, and that they are 30% less likely to get a phone callback).

[42] Alessandro Acquisti & Christina M. Fong, *An Experiment in Hiring Discrimination Via Online Social Networks*, at 32, 36, 28-39 (Oct. 26, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031979

[43] *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment, supra* note 39.

subject to a strikingly high rate of employment discrimination due to an increase in negative perceptions about their religion as well as increased recognition of them as Muslim because of their hijabs. Muslim women who wear hijabs are more likely to face discrimination from employers; one study has shown that 69% of hijab-wearing women have faced discrimination, as opposed to 29% of non-hijab wearing women.[44] Furthermore, yet another study found that job candidates who wear hijabs and applied to retail stores and restaurants suffered from fewer job callbacks and permissions to complete job applications, and interpersonal discrimination.[45] But despite this demonstrable anti-hijab animus in the employment context, the explicit notice rule shifts the burden onto applicants like Ms. Elauf to trigger their Title VII protections by announcing that their dress or grooming practices are religiously-based and requesting an accommodation, whether or not one is actually necessary.

Adoption of the explicit notice rule would likely have a disastrous effect on the Muslim community's overall employment rate. Muslims and EEOC offices have reported a "shocking" spike in anti-Muslim employment discrimination since September 2001.[46] Despite the fact that Muslims

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[44] ACLU WOMEN'S RIGHTS PROJECT, *supra* note 8.

[45] Ghumman & Ryan, *supra* note 21.

[46] Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, NEW YORK TIMES (Sep. 23, 2010), http://www.nytimes.com/2010/09/24/business/24muslim.html?pagewanted=all&_r=0

make up only 0.8% of the country's population,[47] around 20% of the religious discrimination complaints received by the EEOC were from Muslims.[48] Moreover, any further increase in employment discrimination against Muslims is particularly troubling given the fact that the community already suffers from underemployment. According to the Pew Center, 29% of Muslims are underemployed. This is even worse for Muslims under 30, of whom 37% are underemployed.[49]

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[47] *America's Muslim Population 2030*, PEW RESEARCH CENTER (Mar. 2, 2011), http://www.pewresearch.org/daily-number/americas-muslim-population-2030/. The Muslim population is projected to increase to 1.7% of the total population by 2030. *Id.*

[48] *Religion-Based Charges Filed from 10/01/2000 through 9/30/2011 Showing Percentage Filed on the Basis of Religion-Muslim*, U.S. EQUAL EMPLOYMENT OPPORTUNITY http://www.eeoc.gov/eeoc/events/9-11-11_religion_charges.cfm.

[49] *Muslim Americans: No Signs in Growth of Alienation or Support for Extremism*, *supra* note 7.

CONCLUSION

For these reasons, this Court should reject and overturn the Tenth Circuit's ruling and its articulation of an "explicit notice" rule to trigger Title VII's religious accommodation protections.

Respectfully submitted.

JENIFER WICKS
Counsel of Record
Litigation Director
Council on American-Islamic Relations
453 New Jersey Ave SE
Washington, DC 20003
CivilRights@CAIR.com
(202) 488-8787

MUNIA JABBAR
400 7th St NW Suite 202
Washington, DC 20004

No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amicus Curiae*

January 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

Supreme Court of the United States

No. 14-86

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of the position of Respondent before this Court and in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As potential defendants to Title VII discrimination charges and lawsuits, EEAC's members have a substantial interest in the circumstances under which an employer's obligation to consider workplace religious accommodations is triggered. The Tenth Circuit below properly rejected Petitioner EEOC's contention that an employer's obligation under Title VII to eliminate conflicts between a work rule and the sincerely-held religious beliefs of an individual through religious accommodations is triggered whenever the employer indirectly has acquired "'enough information'" about or "assumes correctly the existence of" such a conflict. Petition for a Writ of Certiorari at 16, 17.

Many of EEAC's member company representatives are professionals whose primary responsibility is compliance with equal employment opportunity laws

and regulations. Accordingly, EEAC has a perspective and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC has participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved Title VII questions.[2] Because of its practical experience in these matters, EEAC is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

SUMMARY OF ARGUMENT

In urging this Court to reject the Tenth Circuit's decision below, the EEOC advances its own, new policy position – which purports to replace decades of settled legal principles – that an employer will be considered to be on notice of its obligation to provide religious accommodations under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, when it has acquired enough information on its own to perceive a conflict between the individual's religious beliefs and a work requirement; according to the EEOC, actual notice based on an explicit request from the individual is not required. The EEOC's new interpretation not only is unsupported by Title VII's text and underlying policy objectives, as well as the agency's own longstanding interpretations, but it also is unworkable as a practical matter.

Title VII prohibits workplace discrimination because of, *inter alia*, religion. Religion "includes all

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[2] *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate ... without undue hardship ...." 42 U.S.C. § 2000e(j).

For the better part of four decades, both the federal courts and the EEOC have interpreted Title VII as imposing upon an employer a duty to accommodate only after first being informed that an applicant or employee, due to a sincerely-held religious belief, cannot comply with a conflicting work requirement. In an effort to upend those legal principles, and ostensibly in response to the decision below, the EEOC published a new technical assistance guidance document supporting its litigation position in this case – that an employer violates Title VII by failing to accommodate a conflict between what it correctly perceives to be an applicant or employee's religious belief and an assumed conflict with a work rule, even where the individual never placed the employer on actual notice of his or her religious beliefs or requested a workplace accommodation.

Requiring employers to bear the burden of (1) identifying a religious practice or belief in the first instance; (2) divining a conflict between the perceived religious belief and a work requirement; (3) exploring possible reasonable accommodations; and (4) if no accommodation can be provided without imposing undue hardship, demonstrating by a preponderance of the evidence that more than a *de minimis* burden in fact would result cannot be what Congress envisioned when enacting Title VII. As this Court observed, "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with

respect to ... religion ...." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (footnote omitted). That aim would be frustrated by a rule that requires managers and supervisors to make assumptions about the possible religious practices of applicants and employees in an effort to provide possible reasonable accommodations that may, or may not, actually be necessary.

ARGUMENT

I. NEITHER TITLE VII'S PLAIN TEXT NOR THE EEOC'S LONGSTANDING ENFORCEMENT GUIDANCE PURPORTS TO IMPOSE AN AFFIRMATIVE OBLIGATION ON EMPLOYERS TO REASONABLY ACCOMMODATE PERCEIVED RELIGION-BASED WORK CONFLICTS

Title VII prohibits discrimination in the terms, conditions and privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). In 1972, Congress amended the statute to provide that the term "religion" "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).[3] Petitioner

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[3] As this Court observed in *International Brotherhood of Teamsters v. United States*, "This subsection was added 'to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metal Company*, 429 F.2d (324) (6th Cir. 1970), affirmed by an equally divided court, 402 U.S. 689, 91 S. Ct. 2186, 29 L.Ed.2d 267 (1971).' *Dewey* had questioned the authority of

EEOC contends that an employer's duty to accommodate religion is triggered whenever it "correctly assumes" that a conflict exists between a work requirement and an individual's undisclosed religious belief. Because Title VII does not even contemplate, much less mandate, that an employer make such assumptions about a particular individual's religious practices or beliefs, the EEOC's position is incorrect as a matter of law. Rather, actual notice is essential not only to Title VII's religious accommodations framework, but also to promote compliance with the statute's broader nondiscrimination aims and purposes.

For that reason, and as the Tenth Circuit below correctly held, Title VII "places the onus on the applicant or employee to initially provide explicit notice to the employer of the conflicting religious practice and the need for an accommodation ...." Pet. App. 55a. Because the Tenth Circuit's commonsense ruling is consistent with Title VII's plain text and purposes, as well as the EEOC's own longstanding interpretation, the decision below should be affirmed.

A. Title VII Leaves No Room For Speculation By An Employer Regarding An Individual's Personal Religious Observance, Practices, Or Beliefs

1. An individual's concept of religion can be deeply personal, and entirely subjective

The term "religious practices" is defined broadly to include an individual's "moral or ethical beliefs as to

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the EEOC to define 'religion' to encompass religious practices." 431 U.S. 324, 391 n.20 (1977) (citations omitted).

what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. As the court of appeals below observed, religion thus "is a uniquely personal and individual matter." Pet. App. 16a.

The deeply-held religious conviction of one person may be nothing more than a purely secular, personal preference to another. There are a number of practices and activities that can hold both religious, as well as secular, meaning. *See, e.g., Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989) (peyote use); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (body piercing). The EEOC itself identifies several practices having both religious and non-religious significance, such as the display of tattoos, maintaining facial hair or hair of a certain length, and wearing particular items of clothing, head or face coverings, jewelry, or "other items." EEOC Compl. Man. Section 12: RELIGIOUS DISCRIMINATION, *Notice of the Conflict Between Religion and Work* [Sec. 12 – 4(C)(4)(a)] (July 22, 2008).[4]

It follows that religion is something that is not necessarily immediately apparent to others. Indeed, "A person's religion is not like his sex or race—something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulka [sic], this may not pinpoint his particular beliefs and observances." *Reed v. Great Lakes Cos.*, 330 F.3d 931, 935-36 (7th Cir. 2003). Accordingly, courts have held that Title VII does not require employers to have any particular knowledge about "the beliefs and observances associated with particular sects." *Adeyeye*

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[4] *Available at* http://www.eeoc.gov/policy/docs/religion.html#Toc203359534 (last visited Jan. 26, 2015).

v. Heartland Sweeteners, LLC, 721 F.3d 444, 450 (7th Cir. 2013). For that reason, an applicant or employee "who wishes to invoke an employer's duty to accommodate his religion under Title VII must give the employer fair notice of his need for an accommodation and the religious nature of the conflict." *Id.*

2. Because of the personal nature of religious belief, proof of actual notice to the employer is an essential element of a plaintiff's failure to accommodate claim

"The analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987). The federal courts of appeals consistently have held that in order to make out a prima facie case of failure to accommodate religion, the plaintiff must prove that "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she *informed the employer of this belief*; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir.1985), *aff'd on other grounds*, 479 U.S. 60, 65-66 (1986) (emphasis added) (citations omitted); *see also Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004); *Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996); *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013); *Reed v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 569 F.3d 576 (6th Cir. 2009); *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997);

Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149 (10th Cir. 2000); *Dixon v. Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010).

"Implicit within plaintiff's prima facie case is the requirement that *plaintiff* inform his employer of both his religious needs and his need for an accommodation." *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) (emphasis added). A plaintiff alleging a failure to accommodate religion thus cannot establish the basis for a successful claim without demonstrating that he or she provided the employer with actual notice of the conflict posed by a sincerely-held religious belief.

B. Until Very Recently, The EEOC Consistently Interpreted Title VII's Religious Accommodation Requirement To Be Triggered Only Upon Actual Notice From The Applicant Or Employee Of A Religion-Based Work Conflict

The EEOC glosses over the fact that until just last year, its own enforcement guidance "repeatedly, expressly, and unequivocally" assigned to the individual seeking religious accommodation the responsibility for notifying the employer of that fact – not the other way around. Pet. App. 55a; *see also* EEOC Compl. Man. Section 12: RELIGIOUS DISCRIMINATION, *Notice of the Conflict Between Religion and Work* [Sec. 12 – 4(A)(1)] (July 22, 2008).[5] There is no indication, express or implied, in any agency pronouncement prior to March 2014 that the EEOC ever understood Title VII to encourage, much less require,

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[5] *Available at* http://www.eeoc.gov/policy/docs/religion.html#Toc203359520 (last visited Jan. 26, 2015).

an employer to initiate a discussion of possible workplace religious accommodations based on its own, subjective perceptions of and assumptions about an individual's religious beliefs.[6]

The EEOC first promulgated regulations interpreting Title VII's religion discrimination provision in 1966. *Guidelines on Discrimination Because of Religion*, 31 Fed. Reg. 8370 (June 15, 1966); *see also* 29 C.F.R. Part 1605, Appendix A to §§ 1605.2 and 1605.3—*Background Information*. The agency explained that:

> [T]he duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodations can be made without serious inconvenience to the conduct of the business.

31 Fed. Reg. 8370 (June 15, 1966) (to be codified at 29 C.F.R. § 1605.1(a)(2)). Approximately one year later, it amended that provision as follows:

> [T]he duty not to discriminate on religious grounds ... includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

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[6] To the contrary, an employer's unsolicited inquiries into the religious beliefs and practices of applicants or employees may, according to the EEOC, give rise to an inference of unlawful discrimination. EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs* (2010), *see infra* note 16.

32 Fed. Reg. 10,298 (July 13, 1967) (to be codified at 29 C.F.R. § 1605.1(b)).[7]

The EEOC's early regulatory interpretations of the duty to accommodate religion were silent as to *when* an employer's obligation to consider accommodations is triggered. The EEOC offered further clarification in 1980, however, revising its regulations to provide, "*After an employee or prospective employee notifies the employer* ... of his or her need for a religious accommodation, the employer ... has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer ... can demonstrate that an undue hardship would in fact result ...." 29 C.F.R. § 1605.2(c)(1) (emphasis added). That version of the regulations remains in effect today.

Over the years, the EEOC has published additional sub-regulatory guidance on various religious accommodations issues, including in the context of dress and grooming policies. Until last year, every EEOC guidance document on the subject either expressly provided or strongly implied that an employer's duty to accommodate would not arise unless and until it was notified of a religion-based conflict by the applicant or employee.[8]

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[7] Congress codified the EEOC's policy position when it amended Title VII in 1972 to expressly impose a duty to accommodate religion, unless doing so would impose an undue hardship. *See Hardison*, 432 U.S. at 74.

[8] The same is, and always has been, generally true of the duty to accommodate disability under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. There, an employer's obligation to consider workplace reasonable accommodations ordinarily is not triggered until an applicant or employee requests one. EEOC

In its *Questions And Answers About The Workplace Rights Of Muslims, Arabs, South Asians, And Sikhs Under The Equal Employment Opportunity Laws* (2002),[9] for instance, the EEOC offers its advice, by way of example, to applicants and employees on seeking religious garb-related workplace accommodations:

> Q: I am a Sikh man and the turban that I wear is a religiously-mandated article of clothing. My supervisor tells me that my turban makes my coworkers "uncomfortable," and has asked me to remove it. What should I do?
>
> A: If a turban is religiously-mandated, *you should ask your employer for a religious accommodation to wear it at work.* Your employer has a legal obligation to grant your request if it does not impose a burden, or an "undue hardship," under Title VII. Claiming that your coworkers might be "upset" or "uncomfortable" when they see your turban is not an undue hardship.

Id. In other words, the EEOC instructs an employee seeking to be permitted to wear religious garb at work for religious reasons to "ask" the employer for a reasonable accommodation, sensibly suggesting – contrary to its position here – that without a specific request for a religious accommodation, the employer has nothing to "grant."

Comp. Man., *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, REQUESTING REASONABLE ACCOMMODATION (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html#requesting (last visited Jan. 26, 2015).

[9] *Available at* http://www.eeoc.gov/eeoc/publications/backlash-employee.cfm (last visited Jan. 26, 2015).

That Questions and Answers document fails to even hint at the notion that an employee need not provide actual notice of his religious observance and attendant conflict with a work rule, so long as the employer "correctly understood" such a conflict to exist. Nor does the EEOC make any such suggestion in its accompanying Question and Answer document geared towards employers. *See* EEOC, *Questions And Answers About Employer Responsibilities Concerning The Employment Of Muslims, Arabs, South Asians, And Sikhs* (2002).[10]

To the contrary, the EEOC in that guidance document cautions employers *against* speculating about the need for workplace religious accommodations, even among employees who appear to share religious beliefs. It also reiterates that the responsibility for notifying the employer of a religious conflict lies squarely with the employee, even where the conflict appears to impact a substantial number of workers (and thus could lead the employer theoretically to presume that all the employees in question require the same, or similar, accommodation). The agency explains, again by way of Question and Answer:

> Q: Three of the 10 Muslim employees in XYZ's 30-person template design division approach their supervisor and ask that they be allowed to use a conference room in an adjacent building for prayer. Until making the request, those employees prayed at their work stations. What should XYZ do?
>
> A: XYZ should work closely with the employees to find an appropriate accommodation that meets

[10] *Available at* http://www.eeoc.gov/eeoc/publications/backlash-employer.cfm (last visited Jan. 26, 2015).

> their religious needs without causing an undue hardship for XYZ. Whether a reasonable accommodation would impose undue hardship and therefore not be required depends on the particulars of the business and the requested accommodation.
>
> * * *
>
> In evaluating undue hardship, XYZ should consider only whether it can accommodate *the three employees who made the request*. If XYZ can accommodate three employees, it should do so. Because individual religious practices vary among members of the same religion, XYZ *should not deny the requested accommodation based on speculation that the other Muslim employees may seek the same accommodation. If other employees subsequently request the same accommodation* and granting it to all of the requesters would cause undue hardship, XYZ can make an appropriate adjustment at that time. For example, if accommodating five employees would not cause an undue hardship but accommodating six would impose such hardship, the sixth request could be denied.

Id. (emphasis added).

In perhaps its most detailed statement on the subject, the EEOC in its *Questions and Answers: Religious Discrimination in the Workplace* (2008 & Supp. 2011)[11] explains that Title VII "requires an employer, *once on notice that a religious accommoda-*

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[11] *Available at* http://www.eeoc.gov/policy/docs/qanda_religion.html (last visited Jan. 26, 2015).

tion is needed, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship." *Id.* at 6. (emphasis added). Later, in response to the question "How does an employer learn that accommodation may be needed?", the agency provides, "An applicant or employee who seeks religious accommodation *must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work.*" *Id.* at 7. (emphasis added).

The EEOC goes on to describe some common types of workplace religious accommodations, including exceptions to employer dress and grooming policies. Pointing out, for instance, that "religious dress" may include head coverings, the agency advises that "[w]hen an employer has a dress or grooming policy that conflicts with an employee's religious beliefs or practices, the employee *may ask* for an exception to the policy as a reasonable accommodation." *Id.* at 13. (emphasis added). As in its earlier guidance, the EEOC does not claim, even in the case of an individual who wears a clearly visible head covering, that the employer is better suited to divine a potential or actual conflict between the employee's religious beliefs and a work requirement.

Accompanying that Question and Answer guidance is a separate document outlining a number of "best practices" for eliminating workplace religious discrimination. There again, the EEOC explicitly instructs employees seeking religious accommodations to "advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules," [providing] "enough information to enable

the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief." EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace* (July 23, 2008).[12] The EEOC's recommendations to employers further confirm its position that individuals faced with a religion-based conflict will be expected to provide actual notice in order to initiate the reasonable accommodations process. For instance, the EEOC suggests that employers should, among other things:

- Inform employees that they will make reasonable efforts to accommodate the employees' religious practices (i.e., convey that the company welcomes such requests and will consider them in good faith, as required by law);
- Train managers and supervisors on *how to recognize religious accommodation requests* from employees (not on how to identify the beliefs or practices of particular religions);
- Consider developing internal procedures *for processing religious accommodation requests* (suggesting that a request must precede any action by the employer); and
- Individually assess each request and *avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate* (signaling to employers that they may not unilaterally identify a perceived conflict and purport to

[12] *Available at* http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited Jan. 26, 2015).

> implement an accommodation based on nothing more than that perception).

Id. (emphasis added).

As the EEOC's own regulations and enforcement guidance make clear, the agency always has understood Title VII's religious accommodation duty to be triggered only after an employer receives from the applicant or employee actual, explicit notice of the religious practice in question and the conflict presented by a work rule. It was not until March 6, 2014 – roughly five months after losing its appeal below – that the EEOC published "two new technical assistance publications addressing workplace rights and responsibilities with respect to religious dress and grooming" under Title VII, in which it adopted the radically different position that employers have a legal obligation under Title VII to, in effect, accommodate perceived religion-based work conflicts.[13]

The first document is comprised of a series of Questions and Answers specifically on grooming policy-related religious accommodation issues. Regarding when an employer will be deemed to have "knowledge" of an applicant or employee's religious beliefs and need for accommodations due to a work conflict, Question and Answer 7 of the guidance provides:

> Q: How will an employer know when it must consider making an exception to its dress and

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[13] *See* EEOC Press Release, *EEOC Issues New Publications on Religious Garb and Grooming in the Workplace* (Mar. 6, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm (last visited Jan. 26, 2015).

grooming policies or preferences to accommodate the religious practices of an applicant or employee?

A: Typically, the employer will advise the applicant or employee of its dress code or grooming policy, and subsequently the applicant or employee will indicate that an exception is needed for religious reasons. *Applicants and employees will not know to ask for an accommodation until the employer makes them aware of a workplace requirement that conflicts with their religious practice.* The applicant or employee need not use any "magic words" to make the request, such as "accommodation" or "Title VII." If the employer reasonably needs more information, however, the employer and the employee should discuss the request. *In some instances, even absent a request, it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed.*

EEOC, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities* (2014)[14] (emphasis added). To reinforce the point, the agency offers the following example, which appears to be based on, or at least motivated by, the factual allegations underlying this case:

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[14] *Available at* http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited Jan. 26, 2015).

EXAMPLE 7

Employer Believes Practice Is Religious and Conflicts with Work Policy

> Aatma, an applicant for a rental car sales position who is an observant Sikh, wears a chunni (religious headscarf) to her job interview. The interviewer does not advise her that there is a dress code prohibiting head coverings, and Aatma does not ask whether she would be permitted to wear the headscarf if she were hired. There is evidence that the manager believes that the headscarf is a religious garment, presumed it would be worn at work, and refused to hire her because the company requires sales agents to wear a uniform with no additions or exceptions. *This refusal to hire violates Title VII, even though Aatma did not make a request for accommodation at the interview, because the employer believed her practice was religious and that she would need accommodation*, and did not hire her for that reason. Moreover, if Aatma were hired but then instructed to remove the headscarf, she could at that time request religious accommodation.

Id. (emphasis added). Read together, these statements signal to the EEOC's stakeholders – employers as well as employees – that the agency now will treat any situation in which an employer "believes" or even simply "presumes" that an individual's garb is "religious" in nature and requires workplace accommodation as a facial violation of Title VII where an accommodation is not made. The EEOC's current policy stance as outlined in the new guidance not only represents a complete reversal of its decades-old interpretations, but also expressly endorses the very policy position that the court of appeals rejected

below.[15] Thus, the agency's contention that its position "in this case, in prior litigation, and in recent guidance—is consistent with the EEOC's earlier published guidance," Brief of Petitioner at 21, is plainly false.

II. PLACING THE BURDEN ON EMPLOYERS TO IDENTIFY A RELIGION-BASED WORK CONFLICT AND POTENTIAL NEED FOR RELIGIOUS ACCOMMODATIONS UNDERMINES THE POLICIES AND AIMS UNDERLYING TITLE VII AND IS UNWORKABLE AS A PRACTICAL MATTER

A. Anything Short Of An Actual Notice Standard Would Force Employers To Make Assumptions About Possible Religious Beliefs Based Purely On An Individual's Personal Appearance

Simply put, the EEOC's new interpretation of Title VII's religious accommodation requirement is anathema to the goals and objectives underlying Title VII,

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[15] The practical consequences of the EEOC's new policy position are much more significant than may appear at first glance. Before a plaintiff can bring a religious accommodation lawsuit in federal court, he or she must first exhaust administrative remedies by filing a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(f)(1). In addition to the fact that EEOC charge investigations have become increasingly time-consuming and expensive to defend, to the extent that the EEOC now has conveyed the message that it will find reasonable cause in cases such as this one – and also may consider suing, as it did here – employers will be under great pressure to settle such claims, even if a court ultimately may not agree with the EEOC's interpretation of Title VII.

including the key purpose of ensuring that employment decisions are made in a nondiscriminatory manner, without regard to personal characteristics unrelated to the job.

In *Hardison*, this Court observed that:

> From the outset, Congress has said that "(t)he purpose of (Title VII) is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin." When Congress amended Title VII in 1972, it did not waver from its principal goal. While Congressmen differed on the best methods to eliminate discrimination in employment, no one questioned the desirability of seeking that goal.

432 U.S. at 72. Contrary to those aims, the EEOC's construction of the statute would encourage employers to make assumptions about an individual's religious beliefs, often based on nothing more than his or her personal appearance.

Under the agency's rationale, an employer could be hauled into court for rejecting an applicant for a "front of the house" job due to excessive body piercings without first inquiring as to whether the applicant might require a workplace religious accommodation due to a possible, undisclosed religious belief. Requiring employers to make assumptions about what may be complex, deeply personal religious (or explicitly non-religious) beliefs of applicants and employees – and then purport to implement workplace accommodations to eliminate any perceived religion-based work conflicts – would frustrate, rather than advance, Title VII's aim to eliminate unfounded myths and

stereotypes that so often lead to discrimination against protected groups.

More directly, such a rule would seriously impair meaningful efforts to determine whether and to what extent reasonable accommodation to an individual's religious beliefs are possible. As a practical matter, the successful implementation of workplace accommodations depends heavily, if not exclusively, upon the specific needs of the applicant or employee at that particular time. Actual notice from the individual of the religion-based work conflict is a crucial first step to the religious accommodations process.

As the Tenth Circuit observed below:

> [T]he answers to the key questions that determine whether an employer has an obligation under Title VII to provide a reasonable religious accommodation ordinarily are only within the ken of the applicant or employee; because an employer's obligation to engage in the interactive religion-accommodation process is only triggered when the employer has answers to those questions; and because, in implementing Title VII's anti-discrimination mandate, the EEOC has expressly disapproved of employers inquiring in the first instance or speculating about the answers to such questions.

Pet. App. 46a.

Furthermore, forcing employers to make religious accommodation decisions based on guesses and assumptions would produce nonsensical results. For example, an employee may request that his supervisor no longer schedule him for work from sundown Friday to sundown Saturday. He has not specified whether the request is being made for religious reasons, or for

purely non-religious reasons – such as the desire to take advantage of prime deep-sea fishing time or to attend his child's little league games. Should the supervisor simply assume because many people observe Sabbath from sundown Friday to sundown Saturday that this particular employee's request (1) is religious in nature and (2) must be accommodated to the point of undue hardship? Or:

> Suppose the employee is an Orthodox Jew and believes that it is deeply sinful to work past sundown on Friday. He does not tell his employer, the owner of a hardware store that is open from 9 a.m. to 6 p.m. on Fridays, who leaves the employee in sole charge of the store one Friday afternoon in mid-winter, and at 4 p.m. the employee leaves the store.

Reed v. Great Lakes Cos., 330 F.3d 931, 936 (7th Cir. 2003). Although the Seventh Circuit opined that the employer "could fire him without being thought guilty of failing to accommodate his religious needs," *id.*, the EEOC ostensibly would disagree – and would urge this Court to do so as well. As that hypothetical illustrates, however, employers simply cannot be expected to assume the existence of a religious conflict any time an employee makes a change to his or her regular work schedule.

Moreover, managers and supervisors are not trained to independently discern an individual's religious practices and how they may or may not interfere with existing work requirements, nor are such efforts even implicitly required by Title VII. This Court has warned courts against probing unnecessarily into an individual's religious beliefs, see *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (quoted in *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir.1978)), and "[i]f

courts may not make such an inquiry, then neither should employers." *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (citations and quotations omitted).

B. Asking Questions About Religious Practice And Belief Necessarily Invites Suspicion Of Disparate Treatment Discrimination

Such inquiries naturally could lead a rejected job candidate to assume, for instance, that his or her perceived religious beliefs and requirements – not a lack of qualifications – motivated the employer's actions. That assumption, in turn, could prompt the individual to file a discrimination charge with the EEOC, which undoubtedly would *not* refuse to accept it on the ground that the employer acted in conformance with the agency's re-vamped policy guidance on religious accommodations. To the contrary, the EEOC likely would pursue such a case vigorously under a traditional disparate treatment discrimination theory, pointing to its longstanding view that inquiries about an individual's religion, while not *per se* unlawful, could give rise to an inference of unlawful discrimination.

As the Tenth Circuit aptly noted below, the EEOC for that reason warns employers against initiating a discussion about religious belief. Pet. App. 25a. In a fact sheet on prohibited practices under Title VII, for instance, the EEOC states that "[q]uestions about an applicant's religious affiliation or beliefs (unless the religion is a bona fide occupational qualification (BFOQ)), are generally viewed as non job-related and problematic under federal law." EEOC, *Pre-Employment Inquiries and Religious Affiliation or*

Beliefs (2010).[16] The agency reinforces that view in a 2005 opinion letter, explaining that while it is "not *per se* illegal to ask applicants questions regarding their religious background, beliefs, and practices ... such questions would be potential evidence of the employer's discriminatory intent if a religious discrimination claim was filed by an applicant alleging he or she was not hired based on religion ...." EEOC, Informal Discussion Letter, *Title VII: Religious Discrimination and ADA: Disability-Related Inquiries and Medical Examinations* (Mar. 10, 2005).[17] It is entirely conceivable that individuals questioned in such a manner and who subsequently are discharged or not hired for legitimate reasons may jump to the conclusion that unlawful discrimination motivated the employer's actions. That is just the kind of case the EEOC is likely to consider litigating. *See, e.g.*, EEOC Press Release, *Guam Aircraft Company Sued for Religious Discrimination by EEOC* (Oct. 3, 2011) (declaring that the EEOC "will fight to secure equal justice at work, regardless of whether one's religious beliefs and practices are less familiar").[18]

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[16] *Available at* http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Jan. 26, 2015).

[17] *Available at* http://www.eeoc.gov/eeoc/foia/letters/2005/title_vii_religious_ada_inquiries_examinations.html (last visited Jan. 26, 2015).

[18] *Available at* http://www.eeoc.gov/eeoc/newsroom/release/10-3-11f.cfm (last visited Jan. 26, 2015).

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit below should be affirmed.

Respectfully submitted,

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amicus Curiae*

January 2015

No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner

v.

ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* FIFTEEN RELIGIOUS AND CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF PETITIONER

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
DWAYNE LESLIE
DIR. OF LEGISLATIVE AFFAIRS
General Conference of Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

[Additional counsel on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an employer can be liable under the religious-accommodation provision of Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

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118 Cong. Rec. (1972) 6, 13, 14, 15

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

When Congress added a religious-accommodation requirement to Title VII in 1972, it recognized that, as a practical matter, religious freedom in the workplace is as important to most believers as freedom from restrictions on religious practice imposed by the government. After all, nearly everyone needs a job, and workplace rules can interfere with religious practice as effectively as governmental restrictions. Accordingly, Congress required that, when an employer can do so "without undue hardship on the conduct of [its] business," the employer must "reasonably accommodate ... *all* aspects" of an "employee's or prospective employee's religious observance or practice." 42 U.S.C. § 2000e(j) (emphasis added).

According to the legislative history, Congress's purpose in adopting this provision was to ensure that, absent a truly undue burden on the employer, no religious believer should be disadvantaged in his or her employment prospects—compared with other employees or applicants—because of adherence to religious beliefs. Or, as this Court has put it, the provision is designed to ensure "equality of employment opportunities" regardless of religious belief or practice. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 276 (1982).

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[1] No one (including a party or its counsel) other than the *amici curiae*, their members and counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief in communications on file with the Clerk.

Unfortunately, two of the Tenth Circuit's holdings—both of which are fairly included in the question presented—would eviscerate this critical protection for religious freedom. First, as the EEOC explains and the majority conceded, the panel's decision invents a new requirement that to be in violation of the accommodation provision the employer must have "actual knowledge," not just notice, of a need for a religious accommodation, *and* that this knowledge "counts" only if it comes directly from the employee or applicant. Second, the majority erected a new, nonstatutory requirement that the accommodation must be "required" in the sense that the "religious observance or practice" is "inflexible" or mandatory, not just recommended or encouraged by the employee's religion.

Amici curiae, religious and civil-rights organizations representing tens of millions of Christians, Jews, Muslims, Sikhs and other faith groups throughout the United States, are deeply concerned about the impact of these two holdings on the ability of religiously observant job applicants to obtain and keep employment and, equally important, to continue following the tenets of their faith. From personal experience working with their members and clients, *amici* know that the disparity between employer and employee is nowhere greater than during the hiring process. Frequently, an applicant will be unaware of a work-religion conflict simply because of her inferior knowledge of the employer's work requirements. And even if the applicant is aware of a potential conflict, hiring processes—increasingly initiated online—are often structured in a way that precludes the employee from even raising the issue.

The Tenth Circuit's heightened *scienter* requirements thus create an even greater incentive for employers to act as "ostriches"—remaining willfully ignorant of the religious needs of employees, applicants and their families. Those requirements are also inconsistent with Congress's evident purposes to ensure that Title VII protects religiously motivated conduct as well as belief, thereby ensuring an "equality of employment opportunities" that protects people of faith from having to choose between their faith and their employment. *Pullman-Standard*, *supra*, 456 U.S. at 276. The Tenth Circuit's heightened *scienter* requirements would allow employers routinely to force employees and applicants to choose between those two imperatives, which would in turn undermine the ability of many believers to provide for themselves and their families.

Similarly, by allowing an employer to deny an accommodation based upon the perceived "flexibility" of a religious conviction, the Tenth Circuit's approach turns Title VII on its head. It contravenes Congress's express choice that, except where unduly burdensome, employers and potential employers must accommodate "*all* aspects" of an employee or applicant's "religious observance or practice, as well as belief," 42 U.S.C. § 2000e(j) (emphasis added), not just some of them. In that respect too, the Tenth Circuit's approach undermines Congress's purpose of ensuring "equality of employment opportunities" regardless of religious belief or practice.

STATEMENT

This case involves a young Muslim woman, Samantha Elauf, who was denied a job at an Abercrombie & Fitch store. The denial was based on an interview with a store official who, seeing she wore a headscarf, thought Ms. Elauf would likely require an accommodation of the store's "Look Policy," which prohibits headgear.

Over a vigorous dissent by Judge Ebel, the Tenth Circuit majority held that a job applicant who is rejected based on the employer's perception of a work-religion conflict cannot make a *prima facie* case under Title VII unless, during the hiring process, a specific religious practice and resulting work-religion conflict were expressly flagged *by the potential employee*—even if the employer was otherwise on notice of the conflict. See *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1122-23 (10th Cir. 2013); Pet. App. 28a-30a. Equally important, in reaching that conclusion, the Tenth Circuit held that an employer is "required" to accommodate a religious practice only if the potential employee views it as "inflexible"—that is, mandated rather than merely encouraged by the employee's religious beliefs. *Id.* at 23a-24a, 39a, 41a, 52a, 54a. Absent reversal by this Court, both holdings will govern the proceedings on remand in the district court in this case, and in future cases in the Tenth Circuit.

SUMMARY

I. The protections of Title VII are very important, not only to the religiously observant, but to the faiths to which they belong. As shown by the history of the 1972 amendment, Congressional action was prompted by court decisions that read Title VII more narrowly than the First Amendment, and thus provided no private workplace protection for religiously motivated conduct. As a result, Congress sought to provide protection in private employment at least equal to what the Constitution provides in the public sphere, thus ensuring what this Court has called an "equality of employment opportunities" for people of faith. *Pullman-Standard, supra,* 456 U.S. at 276.

The need for such accommodation is particularly acute in two areas. First, Sabbath and holy day observances often conflict with mandatory work schedules. And online application systems make it practically impossible for applicants to inform potential employers *why* they cannot work on certain days, resulting in automatic rejection. Second, religious dress and grooming requirements often conflict with the public image employers seek to portray. Moreover, such outward displays of one's faith are usually evident during job interviews, and compromise can often be found—as long as employers have an incentive to undertake the necessary dialogue.

II. The Tenth Circuit's heightened knowledge requirements not only destroy that incentive; they are also divorced from the text, history and purpose of the 1972 accommodation provision. By requiring that the employer have subjective knowledge of the need for religious accommodation *and* that such knowledge come via communication from the seeker of the ac-

commodation, the Tenth Circuit has simply rewritten that provision. Nothing in its text suggests such a draconian requirement. And the provision's history shows that Congress sought to enable the religiously observant—particularly religious minorities—to stand on equal ground with their non-observant fellow citizens. *Id.* The Tenth Circuit's heightened *scienter* requirements would undermine that objective.

Those requirements also lead to absurd results, particularly for job applicants. For example, merely by observing an applicant's dress, a potential employer may learn that a work conflict is likely. But under the Tenth Circuit's approach, the employer is under no duty to say anything unless the applicant—ignorant of the job's duties and thus the conflict—says something about it. Thus, instead of spurring a dialogue between applicant or employee and employer, the Tenth Circuit's *scienter* requirements will actually chill such communication.

III. The Tenth Circuit's holding that "inflexible" beliefs are more deserving of accommodation than "flexible" ones is similarly erroneous. It injects courts into theological controversies even as it creates a preference for faiths placing relatively greater emphasis on clear-cut commands. An "inflexibility" requirement likewise contravenes the plain text of Title VII, which explicitly requires reasonable accommodation of "all aspects of religious observance and practice." 42 U.S.C. 2000e(j). And like the Tenth Circuit's *scienter* holdings, that requirement also leaves religiously observant employees and applicants at a substantial disadvantage compared to the non-observant, thereby contravening the "equality of employment opportunity" that Title VII's accommodation provision was designed to provide.

ARGUMENT

I. Title VII's accommodation provision is highly important to individuals and families of all faiths, and to the religious bodies to which they belong.

Before explaining why the Tenth Circuit's holdings were wrong, it is important to understand why Title VII's religious-accommodation provision is so important to so many people of faith. That provision was adopted by Congress in 1972 in response to judicial decisions that had adopted a narrow reading of the 1964 Act's general prohibition of discrimination based on religion. See 118 Cong. Rec. 705-31 (1972); see also Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 362-63, 368 (1997). In essence, those decisions held that in the employment setting, Title VII's original prohibition on religion-based discrimination protected only religious belief, not religiously motivated conduct. *E.g., Riley v. Bendix Corp.*, 330 F. Supp. 583 (1971); *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970) *aff'd*, 402 U.S. 689 (1971). Those decisions thus suggested that Title VII's prohibition of religious discrimination in the private workplace was narrower than the protection provided in the context of governmental regulation by the First Amendment, which has long been held to protect not just religious belief, but religiously motivated conduct. *E.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972). According to the chief Senate sponsor of the 1972 amendment, Randolph Jennings, the new accommodation provision was intended to make clear that Title VII's prohibition on religious discrimination "protect[s] the same rights in private employment as the Constitution protects in Federal, State, or local governments." 118 Cong. Rec.

at 705. Accordingly, with the new accommodation provision, the Title VII prohibition on religious discrimination would clearly protect not only religious belief, but also religiously motivated conduct.

Protection of religiously motivated conduct in the employment setting is highly important to believers of virtually all stripes, and to the religious bodies to which they belong. Indeed, in proposing the accommodation provision at issue here, Senator Jennings noted that employers' failure to accommodate religiously motivated conduct had led to "a dwindling of the membership of some ... religious organizations." *Id.*

Furthermore, religion is unlike the other protected characteristics or traits in Title VII. The others (race, color, sex, etc.) merely require equal treatment in order to have equal opportunity. But religion requires special treatment (*vis-à-vis* other employees or applicants) in order to have equal opportunity.

As we now show, the need for such accommodations is particularly important for two types of religious beliefs: those relating to Sabbath and other holy day observances, and those (like the belief at issue in this case) relating to religious dress and grooming standards.

A. Sabbath and other holy day observances frequently conflict with employers' work schedules.

Even after the adoption of Title VII's accommodation provision, there are numerous conflicts between job duties and religious convictions regarding Sabbaths and holy days. See, *e.g., Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Balint* v.

Carson City, 180 F.3d 1047 (9th Cir. 1999); *Brown* v. *General Motors Corp*, 601 F.2d 956 (8th Cir. 1979). For example, Seventh-day Adventists, Seventh Day Baptists and observant Jews all observe Sabbath from sundown on Friday to sundown on Saturday. Other Christian groups hold similar beliefs on Sunday observance. Many Jews, Muslims, Christians and members of other faiths also observe holy days that sometimes occur during the business week.

While religious limitations on an employee's work schedule may not be as visible as the headscarf in this case, recent trends in employment applications indicate that this is a serious, although largely hidden, problem. Online recruiting and employment applications have exploded over the past decade.[2] And automated screening of online applications has become ever more prevalent.[3] But automated application processes create a serious problem for applicants whose religious practices create scheduling limitations by making it more difficult for such applicants to bring to an employer's attention the religious reasons for their scheduling limitations.

Unfortunately, the Tenth Circuit's reasoning gives the employer a perverse incentive to *deny* to religiously observant applicants any opportunity to dis-

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[2] See Online Job Recruitment: Trends, Benefits, Outcomes and Implications, available at www.hr.com/en/communities/staffing_and_recruitment/online-job-recruitment-trends-benefits-outcomes-an_f70ogs0y.html (Sept. 25, 2007) (last viewed Aug. 15, 2014).

[3] See Recruiting Technology and Recruiting Software Trends 2013, available at www.recruiter.com/recruiting-technology-and-recruitingsoftware-trends.pdf (last viewed Aug. 15, 2014).

cuss religion-based limitations on their appearance or scheduling. Under that reasoning, the employer's ignorance automatically defeats a *prima facie* case, and thus effectively eliminates Title VII's accommodation protections for those applicants. Under the Tenth Circuit's position, then, observers of Sabbaths and other holy days will find themselves effectively excluded from a large and growing sector of the workforce that is hired through online applications.[4]

B. Religiously motivated appearance frequently conflicts with employers' "look" rules.

Another issue that often arises in the workplace concerns religious dress and appearance. Many Muslim women, like Ms. Elauf, believe that the Quran requires or at least encourages them to cover their heads in public. See, *e.g.*, *Kaukab* v. *Harris*, 2003 WL 21823752 (N.D. Ill. Aug. 6, 2003). Sikhs are likewise

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[4] *Amici* have received numerous troubling reports of online application systems that have precisely this effect. In those systems, once an applicant has completely filled out one of a series of pages, that page is submitted and the next page appears. During this process, a page generally inquires about the applicant's scheduling availability. If the applicant indicates any limitation, the response is not accepted and the applicant is unable to proceed further with the application—and therefore cannot be hired. Thus, a Sabbath-observer who does not indicate availability for work during her Sabbath is unable even to complete the application and is thus excluded from employment, even if a scheduling accommodation could be accomplished with little to no effort or cost to the employer.

The Tenth Circuit's decision effectively insulates such systems from any legal challenge under Title VII. And that means that many religiously observant job seekers will never even get to the interview stage of the hiring process.

required to wear turbans and maintain uncut hair, including beards. See, *e.g.*, *Bhatia* v. *Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984); *EEOC* v. *United Galaxy, Inc.*, Civ. No. 10-4987 (ES), 2013 WL 3223626 (D.N.J. June 25, 2013). And many Jews wear head coverings such as hats or yarmulkes. See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

Appearance-related religious practices are also often found in various Christian denominations. Many Pentecostal women do not cut their hair and wear head coverings. And Christians of all denominations wear various forms of religious jewelry such as crosses or crucifixes, religious medals and evangelistic messages. See, *e.g.*, *Rivera* v. *Choice Courier Systems, Inc.*, 2004 WL 1444852 (S.D.N.Y. Jun. 25, 2004); *Hickey* v. *S.U.N.Y. at Stony Brook Hospital*, 2012 WL 3064170 (E.D.N.Y. Jul. 27, 2012).

Some of these religious practices are, by their nature, apparent during an interview. Sometimes, accommodation is possible simply by modifying apparel in a manner that eliminates the conflict. However, such accommodation cannot be achieved unless the need for an accommodation is first identified and discussed. And here again, the Tenth Circuit's decision discourages such discussion because, under that decision, an employer can face liability based only on what the employee or applicant *herself* directly communicates to the employer, not on knowledge the employer might have received from other sources, including the employer's own observations.

In short, the majority's analysis is likely to have profound and far-reaching impacts on a wide variety of religiously observant employees and applicants.

And it will too often force them to choose, unnecessarily, between a job and their faith.

* * * * *

The frequency with which both types of work-religion conflicts arise is undoubtedly influenced by the increasing diversity of religious beliefs and practices.[5] Moreover, while work-religion conflicts are common, they can often be accommodated without undue hardship as long as both employees and employers have an adequate incentive to undertake the necessary dialogue. And in practical terms, that is the issue at the heart of this case—how to ensure that employers as well as employees have adequate incentives to initiate and participate in such problem-solving dialogue.

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[5] See Pew Forum on Religion and Public Life, U.S. Religious Landscape Survey (2008) (available at http://religions. pewforum.org/pdf/report-religious-landscape-study-full.pdf) (last viewed Aug. 15, 2014) (finding that "the United States is on the verge of becoming a minority Protestant country ... Immigrants are also disproportionately represented among several world religions in the U.S., including Islam, Hinduism and Buddhism"); Gallup, Religion (2013) (available at http://www.gallup.com/poll/1690/religion.aspx) (last viewed Aug. 15, 2014) (finding just 41% of respondents to be Protestant).

II. The Tenth Circuit's heightened "knowledge" requirements lack any mooring in Title VII's text or history, and undermine Congress's objective of ensuring "equality of employment opportunities" for believers who follow the tenets of their faith.

As previously explained, the Tenth Circuit adopted two heightened *scienter* requirements for employer liability under Title VII's accommodation provision: the requirement that the employer have "actual, particularized knowledge" of the work-religion conflict, and the requirement that the employer receive that knowledge from the employee herself. As the EEOC persuasively demonstrates (at 28-34), nothing in this Court's decisions or in the EEOC Guidelines supports either of those requirements. In addition, as we now show, those *scienter* requirements find no support in the text, history or purposes of the accommodation provision—all of which compel rejection of both requirements.

A. Those requirements contravene the accommodation provision's history and broad language.

1. The history of the accommodation provision is particularly instructive. As originally enacted, the Civil Rights Act of 1964 placed religion alongside color, national origin, sex and race as prohibited grounds for employment discrimination. 42 U.S.C. § 2000e-2(a)(1). But soon thereafter, it became apparent that this elevation of religion to a place equal to race had received short shrift by most courts.

Two decisions in particular caught Congress's eye. See Engle, *supra* at 362-63, 368; *see also* 118 Cong. Rec. at 706-31. In *Dewey v. Reynolds Metal Co.*, Mr. Dewey, a member of the Faith Reformed Church, had refused for religious reasons to work on Sundays.

429 F.2d 324, 329 (6th Cir. 1970), aff'd by an equally divided court, 402 U.S. 689 (1971). The Sixth Circuit held that his subsequent firing did not violate Title VII, and this Court affirmed by an equally divided court. *Id.* at 328-29. Shortly thereafter, in *Riley v. Bendix Corp.*, 330 F. Supp. 583 (1971), a district court rejected a similar Title VII claim by a Seventh-day Adventist, Mr. Riley, who had refused to work from sun-down on Friday until sun-down on Saturday. *Id.* at 584. The court reasoned that Riley had been "discharged solely because of his refusal to work the hours assigned to him and not as a result of any religious discrimination." *Id.* at 584, 591. The court thus ignored the fact that his "refusal to work the hours assigned to him" was the result of his religious belief.

Responding to these and other decisions, Senator Jennings Randolph proposed an amendment to Title VII. Engle, *supra*, at 368. Randolph, a Seventh-Day Baptist, expressed concern for religious minorities who had Sabbaths on days other than Sunday—specifically Orthodox Jews, Seventh-day Adventists, and Seventh-Day Baptists. 118 Cong. Rec. at 705. But he also sought to protect anyone seeking to honor a religious Sabbath, "whether the day would fall on Friday, or Saturday, or Sunday." *Id.* He noted that employers had either refused to hire, or fired, those with such religious commitments, which he said had led to "pressures" on such religiously inclined individuals, and thence to "a dwindling of the membership of some of the religious organizations." *Id.*

Senator Randolph's focus also extended beyond religious holidays. Noting that life in the United States has become "more pluralistic and more industrialized through the years," he declared that the Civil Rights Act was broadly "intended to protect the same rights

in private employment as the Constitution protects in Federal, State, or local governments." *Id.* He thus foresaw that his proposed amendment would protect religious minorities' "religious freedom, and hopefully their opportunity to earn a livelihood within the American system." *Id.* at 706.

This comment was later echoed by Representative John Dent, the chair of the subcommittee that produced the House's version of the 1972 amendment to Title VII. Dent noted on the House floor that: "Most people just want to work. ... We are trying to see that all of us, no matter of what race, sex, or religious or ethnic background, will have equal opportunity in employment." 118 Cong. Rec. at 7569.

To ensure that the Act achieved those objectives, Randolph proposed an amendment to Title VII, providing that "The term 'religion' includes *all* aspects of religious observance and practice, as well as belief." *Id.* at 705. Contrary to *Dewey* and *Riley,* this provision made clear that a private employer's refusal to accommodate an employee's religiously motivated practice—such as foregoing work on a Sabbath—constituted discrimination based on religion.

Randolph's proposal also included an exception for situations in which "an *employer* demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* (emphasis added). Where an employer could carry its burden of "demonstrat[ing]" a hardship, he would not be liable for religious discrimination. But otherwise, an employer would be required to accommodate religiously motivated practices as well as beliefs.

After a brief floor discussion, the amendment passed unanimously, without amendment. *Id.* at 731. In light of the provision's history and unanimous passage, it is beyond dispute that Congress's purposes in passing the provision were as Senator Randolph and Representative Dent had stated them: to make clear that Title VII (i) protects religiously motivated conduct as well as belief, and (ii) enables people of faith to "earn a livelihood" through private employment on the same terms as other citizens, without having to choose between their jobs and their faith. Or, as this Court has put it, the accommodation provision is designed "to assure equality of employment opportunities" for believers who choose to adhere to the tenets of their faith *Pullman-Standard,* 456 U.S. at 276.

The Tenth Circuit's heightened "actual knowledge" requirements would impair both of these purposes. As this case illustrates, requiring employees—and especially applicants—to personally identify the pertinent work-religion conflict and bring it to the employer's attention would mean that a wide swath of religiously motivated conduct would go unprotected. The majority's approach would also place people of faith at a substantial disadvantage in their efforts to "earn a livelihood through the American system." It would thus effectively destroy the "equality of employment opportunities" that the accommodation provision was designed to create.

2. The text of the accommodation provision even more clearly refutes the majority's heightened *scienter* requirements. Although the EEOC would later adopt a sensible, minimal notice requirement, the text of Senator Randolph's proposal, which Congress adopted without change, contained no advance *scien-*

ter requirement. As enacted, the full provision provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). To be sure, the provision allows the employer to escape liability by "demonstrat[ing] that he is unable to reasonably accommodate" the "religious observance or practice without undue hardship." It thereby implicitly suggests that the employer must learn at some point that the employee has a "religious" observance or practice that needs accommodating. But nothing in the provision says an employer must be so informed *before* a claim under the statute is asserted. The statutory text is silent on that point, and thus doesn't differentiate between an employer knowingly and directly discriminating based on religion, or doing so indirectly based on an employee's religious practice—for example, refusing to hire applicants because they indicate on a form that they cannot work on Saturdays, when the reason they cannot do so is their religious beliefs.[6]

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[6] So too is § 2000e-2(a)(1), which makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...religion..." Although the phrase "because of such individual's religion" might be interpreted in isolation to impose a re-

We recognize of course that the EEOC has interpreted Title VII to require that the employer be "on notice" of the work-religion conflict before a duty to accommodate arises. EEOC, *Compliance Manual, Section 12: Religious Discrimination* § 12-IV Overview (2008). And we do not ask the Court to overturn that interpretation. But given that the statutory text does not itself impose a pre-suit notice requirement, or any other *scienter* requirement, it was highly inappropriate for the Tenth Circuit to require, not mere notice, but "actual, particularized knowledge"—provided by the employee herself, no less—as a prerequisite to an employee's ability to maintain a claim for failure to accommodate. Absent a constitutional requirement, the Tenth Circuit has no authority to engraft onto a statute a *scienter* requirement that Congress has not chosen to include and that the EEOC has chosen not to adopt. See, *e.g., Missouri v. Jenkins,* 515 U.S. 70, 133 (1995) (Thomas, J. concurring) ("Federal judges cannot make...fundamentally political decisions...they detract from the independence and dignity of the federal courts ..."); *Federalist 78* ("The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative

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quirement of advance subjective knowledge, that interpretation is less compelling in light of the language of the religious accommodation provision, which defines "religion" to include religiously motivated conduct as well as belief. Thus, even if the employer doesn't realize that the conduct to which he objects is religiously motivated, under the plain text, discrimination based on that conduct will still constitute discrimination based on religion, and is subject to the statute's accommodation requirement.

body"). To do so violates not only the ordinary plain-meaning rule, but also the principle that civil-rights statutes should be broadly construed to effectuate their remedial purposes. See, *e.g.*, *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977) (declaring that "[t]he language of the 1972 Amendments [of another statute] is broad and suggests that we should take an expansive view of the extended coverage. ...The Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results") (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953)); *Burnett v. Grattan*, 468 U.S. 42, 54 (1984) (noting the "broadly remedial purposes of the Civil Rights Acts"); Pet. Brief at 24-25. That error must be reversed.

3. The Tenth Circuit's heightened *scienter* requirements conflict with the statutory text in another respect. As previously discussed, the text places on the *employer* the burden to "demonstrate[] that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). By its terms, that language places on the employer the burden of establishing every element of that defense, including (a) what the relevant "religious observance or practice" is and (b) what would be necessary to "accommodate" that observance or practice. But by requiring that the employee or applicant provide sufficient information to give the employer "actual, particularized knowledge" of the work-religion conflict, the Tenth Circuit's rule effectively and improperly places on the employee or applicant the burden of proving both of these things.

The Tenth Circuit may well have believed it fair to place that burden on an employee rather than the employer, given that the employee will often be in a better position to know why a particular work requirement conflicts with her religious beliefs. But, as discussed in more depth below, that is generally not true of job applicants, who typically will not learn about the pertinent work requirement unless and until the *employer* tells them. In any event, the Tenth Circuit's burden-shifting scheme is not the approach Congress adopted. And the Tenth Circuit has no authority to amend the statutory scheme—especially in light of the principle, noted above, that civil rights statutes are to be broadly construed in favor of accomplishing their remedial objectives.

In short, there simply is no statutory justification for imposing on the employee the burden of proving in every case that she *personally* gave the employer "particularized actual knowledge" of the relevant work-religion conflict. That error must likewise be reversed.

B. Those requirements lead to absurd results, especially in the application context.

Beyond their inconsistency with the text and history of the Title VII accommodation provision, the Tenth Circuit's heightened *scienter* requirements would lead to absurd results, especially in the context of employment applications.

1. This is particularly true of the Tenth Circuit's holding that the only acceptable source of information concerning a work-religion conflict is the employee or applicant, regardless of all other information of which the employer is aware. See Pet. App. 29a-31a, 33a, 71a. Under that view, for example, Title VII is simp-

ly inapplicable unless Ms. Elauf *personally* uttered certain (unspecified) statements establishing a work-religion conflict. Thus, even if Ms. Elauf had been accompanied to the job interview by her imam, who explained the Quranic requirement of the headscarf, the employer would still have no obligation under Title VII simply because that information did not come directly from Ms. Elauf. That is absurd.[7]

That requirement and the Tenth Circuit's "particularized, *actual* knowledge" requirement are especially unfair in the employment application context, in which an employer's knowledge of its own business and resulting job requirements is vastly superior to that of the applicant. How is an applicant supposed to identify every "particularized" work-religion conflict that might arise during an employment relationship that has not even yet begun?

2. As a result of these misinterpretations of Title VII, the Tenth Circuit's holding effectively permits an employer to ignore a work-religion conflict of which it is actually aware, from a source other than the employee or applicant. That is misguided for at least three reasons.

First, it ignores the obvious information asymmetry between an employer and a job applicant. Surely, for example, an employer who sees an appli-

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[7] While formulations of the *prima facie* case frequently refer to notice by the employee, this is merely because that is the most common fact pattern. In the typical case, the work-religion conflict will be exposed as a matter of course by an employee who objects to a conflicting work requirement once she learns of it. The same cannot be said of potential conflicts with work rules that are known only to an employer during the hiring process.

cant wearing religious apparel will generally be in a better position to determine whether it is likely to create a religion-work conflict in the employer's own workplace. And the employer's knowledge of that potential—gleaned from the interview itself—is certainly relevant in determining whether a disappointed applicant has established a *prima facie* case of religious discrimination.

The same is true of scheduling issues: If a potential employer learns during a job interview that an applicant holds beliefs that may create a scheduling issue, that knowledge too should be relevant in determining whether an employer that refused to hire the applicant did so based on the applicant's religious practice. Yet the Tenth Circuit's holding makes it irrelevant, even for purposes of summary judgment.

The Tenth Circuit's requirement that the employee or applicant identify and articulate a specific, "particularized" conflict heightens the unfairness. It is often said that the majority of communication is nonverbal.[8] And a hyper-technical rule that requires a *verbal* communication of something that has already been effectively conveyed non-verbally is nonsensical and redundant. If the point of the accommodation process is to give the employer a chance to work out a satisfactory accommodation—as it is—that purpose will be served once the employer is aware of the conflict, even if the prospective employee is unable to articulate the conflict in a "particularized" fashion. See, *e.g.*, *Hellinger*, 67 F. Supp.2d at 1363-64.

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[8] See Albert Mehrabian, Silent Messages: Implicit Communication of Emotions and Attitudes (2d ed. 1981).

To be sure, it is fair to expect an employee to inform the employer once the employee learns that a conflict exists. But where the employee or applicant never learns of the conflict—or even, as in this case, is affirmatively led to believe (by a company employee) that no conflict exists, *see* Pet. Brief at 5—there is not only no reason for the employee to provide such information, it is impossible. In that circumstance, as in this case, the employer may be the only party in a position to know whether a conflict exists between a work rule and a potential employee's religious belief or practice. And if that is true, it is patently unfair to place on the applicant the burden of discerning and articulating the conflict.

Second, the Tenth Circuit's *scienter* requirements frustrate one of the main practical purposes of the accommodation requirement, which is to spur a dialogue between employer and employee on how best to meet the employer's objectives while satisfying the employee's religious desires. As this Court has put it, "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and ... the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986). Or, as the Eighth Circuit has suggested, the purpose of Title VII's accommodation process is to allow the "employer [to] have ... the chance to explain the [relevant] policy in relation to [the employee's] religious needs, and perhaps work out an arrangement satisfactory to both parties." *Johnson* v. *Angelica Uniform Group*, 762 F.2d 671, 673 (8th Cir. 1985).

That is what *should* have happened in this case. Once Abercrombie's managers became concerned about Ms. Elauf's headscarf, they should have engaged her in discussion about their concern. Without

inquiring into her religious beliefs, they could have told her (a) that wearing a headscarf would conflict with the store's "look" policy, but (b) that if she were wearing the headscarf for religious reasons, there was a possibility the practice could be accommodated, if it could be done without an undue burden to the employer. If Ms. Elauf then chose to reveal that she was in fact wearing the headscarf for religious reasons, she and the managers could have discussed the issue. And in all likelihood, they could then have worked out an accommodation that would have met both their legitimate needs.

Yet under the standard adopted by the Tenth Circuit, employers like Abercrombie have a powerful incentive to *avoid* any meaningful interaction with applicants and to ignore recognized conflicts rather than communicate about possible solutions. Such an approach defies common sense. As the Ninth Circuit recognized when addressing this same issue in *Heller* v. *EBB Auto Co.*:

> A sensible approach would require only enough information about an employee's religious needs to permit the *employer* to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.

8 F.3d 1433, 1439 (9th Cir. 1993) (emphasis added); accord *Brown* v. *Polk County*, 61 F.3d 650, 654 (8th Cir. 1995); *Hellinger* v. *Eckerd Corp.*, 67 F. Supp.2d 1359, 1363-64 (S.D. Fla. 1999); *Hickey*, 2012 WL 3064170 at *7. With such information in hand—information that Abercrombie had in this case—the employer and employee can then work out an accommodation that meets the needs of both. But such interactions obviously will not occur under a legal re-

gime—like that articulated by the Tenth Circuit—that gives the potential employer a powerful incentive *not* to undertake that discussion during the hiring process. See also Pet. Brief at 26-27.

Third, the majority's approach threatens to cripple Title VII's protection against religious discrimination for a wide swath of job applications from the religiously observant. Because an employer is generally more aware of its own job requirements than a job applicant, the employer will usually be in a better position to determine whether a particular religious belief may create a religion-work conflict. But the Tenth Circuit's holding—that the employer's *own* independent knowledge or notice of an applicant's religious belief is irrelevant to the employee's *prima facie* case—would effectively deny protection to potential employees in all or virtually all such cases.

Indeed, by allowing an employer to act based solely upon a prospective employee's apparent religious conviction—in this case Ms. Elauf's apparent belief in the religious desirability of wearing a headscarf—without attempting to find a reasonable accommodation, the Tenth Circuit's approach turns Title VII's religious accommodation protection on its head. As explained previously, this historic legislation was enacted to provide greater balance in the otherwise asymmetric relationship between employers and employees or applicants. Yet the Tenth Circuit's heightened *scienter* requirements shifts that balance away from the religiously observant employee, making it easier for the employee to be disadvantaged based on her compliance with her religious beliefs. And this too seriously undermines Congress's objective of ensuring "equality of employment opportunities" re-

gardless of religious belief or practice. *Pullman-Standard, supra,* 456 U.S. at 276.

For all these reasons, the Tenth Circuit's imposition of non-statutory *scienter* requirements beyond the EEOC's notice standard must be reversed.

Moreover, instead of the Tenth Circuit's approach, we respectfully suggest that "inquiry notice" should be deemed sufficient to satisfy any *scienter* requirement arising under the Title VII accommodation provision. In other words, once an employer has been provided notice, from whatever source, that a potential conflict *may* exist between a work requirement and an employee's or applicant's religious practice, the employer is required to inquire further to confirm the conflict's existence and scope. An inquiry notice standard is consistent with the EEOC's own approach. EEOC, *Compliance Manual, Section 12: Religious Discrimination* § 12-IV Overview (2008). It is also consistent with the bulk of the lower court decisions, including the district court's decision in this case. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1285-86 (N.D. Okla. 2011); Pet. App. at 115a-118a; *accord United Galaxy,* 2013 WL 3223626 at 11-12 (denying the defendant summary judgment after finding that the mere fact that the plaintiff wore "a turban and an untampered beard...should have put Defendant on notice to inquire further"). It will encourage the bilateral discussions called for in *Heller.* And it will substantially reduce the likelihood that employees and applicants will be placed at a disadvantage because they choose to adhere to their religious beliefs—thereby vindicating Congress's original purpose in enacting the accommodation provision.

III. The Tenth Circuit's "inflexibility" holding is equally wrong, and likewise undermines Congress's purpose of ensuring "equality of employment opportunities" regardless of religious belief or practice.

The majority's "inflexibility" requirement also substantially weakens Title VII's accommodation regime—both in the job application context and more generally. Indeed, that requirement would discriminate in favor of adherents to religions that are more "command"-based, i.e., those replete with "thou shalt's" and "thou shalt not's," and against adherents of religions that eschew such absolutes. Similarly, the "inflexibility" requirement treats adherents of the same religion differently depending on the strictness with which they interpret the teachings of their faith. Absent reversal, moreover, that requirement will govern further proceedings in the district court in this case and, indeed, in all other cases in the Tenth Circuit.

1. The Tenth Circuit's "inflexibility" holding is fairly included in the question presented. As framed by the EEOC's petition, the question asks, in relevant part, "[w]hether an employer can be liable under the religious-accommodation provision of Title VII for refusing to hire an applicant ... based on a 'religious observance and practice' only if the employer has actual knowledge that a religious accommodation was *required*." Petition at i. Obviously, if the religious belief at issue is a "flexible" one, that is, not mandatory on the believer, an accommodation will not be "required" for the employee to be in full compliance with the demands of his or her religion. This Court, therefore, can and should address and reject the Tenth Circuit's "inflexibility" holding.

2. For three reasons, the majority's "inflexibility" requirement merits reversal.

First, the Tenth Circuit's approach contravenes this Court's teaching that forcing courts to choose which beliefs are "central" or mandatory on the one hand, and which are "peripheral" or "flexible" on the other, "cannot be squared with the Constitution or with our precedents, and...would cast the Judiciary in a role that we were never intended to play." *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Thus, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989). Accord *Employment Division* v. *Smith*, 494 U.S. 872, 886-887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion").

Indeed, as the Second Circuit put it in *Ford* v. *McGinnis*, *supra,* "To confine the protection of the First Amendment to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of attempting to resolve intra-faith disputes over religious law and doctrine." 352 F.3d at 593. That too is a powerful reason to reject the Tenth Circuit's "inflexibility" rule.

Second, the majority's "inflexibility" rule is contrary to Title VII's plain language. By its terms Title VII requires accommodation, where it can be done without undue burden, of "*all aspects* of religious observance and practice," not just "observances and practices" that may be considered mandatory. 42 U.S.C. § 2000e(j) (emphasis added). In other words, a religious "observance" or "practice" falls squarely

within the accommodation requirement even if it is merely recommended, encouraged or even motivated by one's religious beliefs. To deny protection to such observances and practices is to eliminate much of the protection Title VII was intended to provide, and that its text explicitly provides.

Other circuits have avoided this mistake. In applying the statute, they have merely required that the claimant have a religious belief that creates a conflict with employment duties and is either "bona fide," *Antoine* v. *First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013); *Peterson* v. *Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *Morrissette-Brown* v. *Mobile Informary Med. Ctr.*, 506 F.3d 1317, 1321 (11th Cir. 2007), or "sincere"—and nothing more. *Webb* v. *City of Philadelphia*, 562 F.3d 256, 259 (3rd Cir. 2009); *Tepper* v. *Potter*, 505 F.3d 508, 514 (6th Cir. 2007); *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013); *Harrell* v. *Donahue*, 638 F.3d 975, 979 (8th Cir. 2011). Given the history and language of Title VII, that is the correct approach.

In another statutory setting, the Seventh Circuit explicitly rejected the logic of the Tenth Circuit's inflexible religious practice test when it noted in the context of a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") that "a religious believer who does more than he is strictly required to do is nevertheless exercising his religion." *Grayson* v. *Schuler*, 666 F.3d 450, 454 (7th Cir. 2012). As an illustration, the court noted that a "Catholic who vows to obey the Rule of St. Benedict and therefore avoid 'the meat of four-footed animals' is per-

forming a religious observance even though not a mandatory one." *Id.*[9] The D.C., Second and Eighth Circuits have similarly rejected an "inflexibility" or "mandatory" requirement as to claims directly under the Free Exercise Clause. See *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002) (holding that a "requirement that a religious practice be mandatory to warrant First Amendment protection finds no support in the cases of the Supreme Court or this court"); *Ford* v. *McGinnis*, 352 F.3d 582, 593 (2nd Cir. 2003) (same); *United States* v. *Means*, 858 F.2d 404, 407 (8th Cir. 1988) (test for religious burden is whether plaintiffs have been compelled to "refrain from religiously *motivated* conduct or to engage in conduct that they find objectionable for religious reasons.") (emphasis added).

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[9] Congress has specified that RLUIPA and the Religious Freedom Restoration Act on which it is based apply to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). That formulation shows that Congress itself views the plain meaning of "exercise of religion" as including religious beliefs that are neither central to nor compelled by any particular "system of religious belief." Given the broad and similar language of Title VII, there is no reason to believe Congress understood the term "religion" as defined there any differently. See also *Korte* v. *Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (noting that "the substantial-burden inquiry does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that"); *Nelson* v. *Miller*, 570 F.3d 868, 878 (7th Cir. 2009) (noting under RLUIPA that "requiring a prisoner to show that his preferred diet is compelled by his religion [is] unlawful"); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is claimed to be burdened be central to the adherent's religious belief system").

Third, as with the panel majority's heightened *scienter* requirements, the majority's "inflexibility" holding would seriously undermine Congress's purpose of ensuring "equality of employment opportunities" even for believers who choose to adhere to the tenets of their religions. *Pullman-Standard, supra,* 456 U.S. at 276. As previously explained, the majority's approach obviously creates an inequality among religious believers, depending upon the degree to which their various religions place more or less emphasis on fixed commands or prohibitions.

Equally important, the majority's approach places believers who wish to show their religious faith and devotion by adhering to their religions' "recommendations," as well as their commands, at a clear disadvantage compared with non-believers who lack such beliefs. Under the Tenth Circuit's ruling, an employer has every right to fire an employee, or to refuse to hire an applicant, if the employee chooses to adhere to a "flexible" religious precept that has *any* impact—even an impact short of an undue burden—on the employer's business.

That too seriously undercuts Congress's purpose of "assuring equality of employment opportunities" regardless of religious belief or practice. *Pullman-Standard, supra,* 456 U.S. at 276. And it is yet another powerful reason to overturn the Tenth Circuit's "inflexibility" holding.

CONCLUSION

The Tenth Circuit's "inflexibility" holding and heightened *scienter* requirements all contravene the plain language of the Title VII religious accommodation provision, even as they substantially undermine Congress's purpose of ensuring that employees and job applicants are not disadvantaged unnecessarily when they choose to adhere to their religious beliefs. The decision below should be reversed.

Respectfully submitted.

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
DWAYNE LESLIE
DIR. OF LEGISLATIVE AFFAIRS
General Conference of Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321

ZAINAB AL-SUWAIJ
EXECUTIVE DIRECTOR
American Islamic Congress
1718 M Street NW, #243
Washington, DC 20036
(202) 595-3160

AISHA RAHMAN
EXECUTIVE DIRECTOR
KARAMAH: Muslim Women Lawyers for Human Rights
1420 16th St. NW, Suite 300
Washington, DC 20036
(202) 234-7302

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave. NE
Washington, DC 20002
(202) 631-1061
gschaerr@gmail.com

GURJOT KAUR
COUNSEL
The Sikh Coalition
50 Broad Street, St. 1537
New York, NY 10004
(212) 655-3095

STEPHEN F. ROHDE
CHAIR
Bend the Arc: A Jewish Partnership for Justice
1801 Century Park East, Suite 2400
Los Angeles, CA 90067

CARL H. ESBECK
LEGAL COUNSEL
National Association

KIMBERLEE WOOD COLBY
DIRECTOR, CENTER FOR LAW & RELIGIOUS FREEDOM
Christian Legal Society
8001 Braddock Rd., St. 302
Springfield, VA 22151
(703) 642-1070

HOLLY HOLLMAN
GENERAL COUNSEL
Baptist Joint Committee for Religious Liberty
200 Maryland Avenue NE
Washington, DC 20002
(202) 544-4226

ROBERTA L. STEELE
PROGRAM DIRECTOR
National Employment Lawyers Association
2201 Broadway, Suite 402
Oakland, CA 94612
(415) 296-7629

DANIEL MACH
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
(202) 675-2330

DECEMBER 10, 2014

of Evangelicals
Room 209 Hulston Hall
University of Missouri
Law School
Columbia, MO 65211-4190
(573) 882-6543

ULESES C. HENDERSON, JR.
GENERAL COUNSEL
Church Of God In Christ
938 Mason Street
Memphis, TN 38126
(818) 488-8155

E. R. LANIER
CHAIR, LEGAL COMMITTEE
Orthodox Church in America
6850 N. Hempstead Turnpike
Syosset, NY 11791
(516)-922-0550

APPENDIX

APPENDIX

Interests and Descriptions of Particular *Amici Curiae*

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents more than 76,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,400 congregations with more than 1.1 million members. Observance of the Sabbath is a central tenet of the Seventh-day Adventist church. The Adventist church has a strong interest in seeing that its members and all individuals of faith are protected from workplace discrimination.

The American Islamic Congress (AIC) serves both Muslims and Non-Muslims through the promotion of civil and human rights, including religious freedom. Its programs have reached tens of thousands of people in 40 U.S. states and across the globe. AIC recognizes that American Muslims have prospered under this country's tradition of religious tolerance, and that American Muslims must champion and protect such tolerance for people of all faiths.

KARAMAH: Muslim Women Lawyers for Human Rights is a nonprofit organization committed to promoting human rights globally, especially gender equity, religious freedom and civil rights in the United States. It pursues its mission through education, legal outreach and advocacy.

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional

boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive society.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Founded on September 11, 2001, the Sikh Coalition works to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has successfully litigated cases on behalf of Sikh Americans who wear visible articles of faith, including turbans and unshorn hair (and beards), and have been denied employment or fired because of uniform or grooming policies and/or employers' claims of "lack of notice." Unlike some faiths where only the clergy are in uniform, all Sikhs are required to wear external articles of faith such as a steel bracelet (kara), uncut hair and beard (kesh), a comb (kangha) to care for their hair, and a turban (dastaar) to cover their hair. Globally and in the U.S., these articles of faith distinguish members of the Sikh religion and make them instantly recognizable, similar to a person's race or sex. Through our years of work on behalf of the Sikh community, we have found that qualified Sikh applicants are at a severe disadvantage during the hiring process, unaware or uninformed of dress code or grooming policies, and frequently victimized by an employer's willful failure to engage in an interactive religious accommodation process.

The National Association of Evangelicals is the largest network of evangelical churches, denomina-

tions, colleges and independent ministries in the United States. It believes that religious freedom is God-given, and that the government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of safeguarding religious freedom, and believes that this jurisprudential heritage should be carefully maintained.

The Christian Legal Society (CLS) is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, which is essential to a free society, prospers only when the religious liberty of all Americans is protected, regardless of the current popularity of their particular religious beliefs and conduct. Religious individuals' ability to pursue their livelihoods without forfeiting their religious beliefs and conduct, and without being discriminated against based on those religious beliefs and conduct, lies at the heart of religious liberty.

Interfaith Alliance Foundation is a nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, the Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. The Alliance has a long history of working to ensure that religious freedom and civil rights are respected in workplaces across the country.

The Baptist Joint Committee for Religious Liberty (BJC) is a 75 year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with sup-

porting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous protection of no establishment and free exercise principles is essential to religious liberty for all Americans.

The Church of God in Christ is the fifth largest Protestant religious denomination and the largest African American church in the United States, with churches in 63 countries worldwide and an estimated membership of nearly 6.5 million members. The Church seeks to protect the religious freedoms of its members and all Americans.

Rev. Gradye Parsons, Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A) is the senior ecclesiastical officer of the Presbyterian Church (U.S.A.). The PCUSA is a national Christian denomination with nearly 1,760,000 members in just under 10,000 congregations, organized into 171 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. Although the General Assembly does not claim to speak for all Presbyterians, it is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. Religious liberty and protection from workplace discrimination are foundational in our policies.

The Orthodox Church in America was established in the Aleutian Islands and Alaska in the 1790s as a missionary initiative of the Russian Orthodox Church. Today the Church is the religious home of thousands of Orthodox Christians worshiping in tem-

ples across the country, and was granted independence from the Russian Church in 1970. The Orthodox Church in America rejoices in the strong value of religious freedom which is one of the hallmarks of American democracy, and it is committed to the effort to ensure full enjoyment of First Amendment religious rights in the workplace.

The Ethics & Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious freedom, freedom of speech, sanctity of human life, family, and ethics. Southern Baptists believe they are under divine obligation to live out the requirements of their faith in all aspects of life, including in their employment. We support the ability of members of other faith groups to be able to do so as well.

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Oklahoma is a state affiliate of the national ACLU. For nearly a century, the ACLU has been at the forefront of efforts to combat discrimination and to safeguard the fundamental right to religious freedom.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who

represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

No. 14-86

In the

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE UMME-HANI KHAN IN SUPPORT OF PETITIONER

ZAHRA BILLOO
FATIMA IQBAL
COUNCIL ON AMERICAN-ISLAMIC RELATIONS – SAN FRANCISCO BAY AREA OFFICE
3000 Scott Blvd.,
Suite 101
Santa Clara, CA 95054
(408) 986-9874

CHRISTOPHER HO
Counsel of Record
MARSHA J. CHIEN
THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER
180 Montgomery Street,
Suite 600
San Francisco, CA 94104
(415) 864-8848
cho@las-elc.org

Counsel for Amicus Curiae

December 9, 2014

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Other Authorities

Alyssa E. Rippy & Alana Newman, *Perceived Religious Discrimination and Its Relationship to Anxiety and Paranoia Among Muslim-Americans*, 1 J. Muslim Mental Health 5 (2006) 13

Arab American Institute, *American Attitudes Toward Arabs and Muslims: 2014* (2014), *available at http://b.3cdn.net/aai/3e05a493869e6b44b0_76m6iyjon.pdf* 5, 6

Azadeh Ghaffari & Ayşe Çiftçi, *Religiosity and Self-Esteem of Muslim Immigrants to the United States: The Moderating Role of Perceived Discrimination*, 20 Int'l J. for Psychol. Religion 14 (2010) 13

BBC, *Hijab*, Religions Islam: Hijab, http://www.bbc.co.uk/religion/religions/islam/beliefs/hijab_1.shtml (last updated Sep. 3, 2009). 1

Bradley R. E. Wright et al., *Religious Affiliation and Hiring Discrimination in New England: A Field Experiment*, 34 Research in Social Stratification and Mobility 111 (2013) 14

Crosby Burns, *The Costly Business of Discrimination, The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* 3, 13 (2012) http://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf 17

Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 Geo. L.J. 1, 3 (2000); *see also* Eddie A. Jauregui, *The Citizenship Harms of Workplace Discrimination*, 40 Colum. J.L. & Soc. Probs. 347 (2007) 10

Daniel Widner & Stephen Chicoine, *It's All in the Name: Employment Discrimination Against Arab Americans*, 26 Soc. F. 806 (2011).....15

Dena Hassouneh & Anahid Kulwicki, *Mental Health, Discrimination, and Trauma in Arab Muslim Women Living in the US: A Pilot Study*, 10 Mental Health, Religion, & Culture 257 (2007) 13, 14

Elizabeth A. Deitch et al., *Subtle Yet Significant: The Existence and Impact of Everyday Racial Discrimination in the Workplace*, 56 Human Relations 1299 (2003) 11

Elizabeth Pinel, *Stigma Consciousness: The Psychological Legacy of Social Stereotypes*, 76 J. Personality & Soc. Psychol. 114 (1999) 11

Fazia Patel & Amos Toh, *Commentary: The Clear Anti-Muslim Bias Behind Anti-Shariah Laws*, Wash. Post (Feb. 21, 2014), http://www.washingtonpost.com/national/religion/commentary-the-clear-anti-muslim-bias-behind-anti-shariah-laws/2014/02/21/381d7a7a-9b30-11e3-8112-52fdf646027b_story.html 6

Fazia Patel et al., *Foreign Law Bans* (May 23, 2013), https://www.americanprogress.org/issues/security/report/2013/05/16/63540/foreign-law-bans/ 6

Greg Garrison, *Amendment Banning Foreign Law in Alabama Courts Passes; Will Be Added to Alabama Constitution*, AL.com, (Nov. 04, 2014, 11:40 PM), http://www.al.com/news/index.ssf/2014/11/amendment_banning_foreign_law.html 6-7

Hani Khan, *Hani Khan, in* Patriot Acts: Narratives of Post-9/11 Injustice 165, 167 (Alia Malek ed., 2011).....3

Juan M. Madera et al., *Bringing Social Identity to Work: The Influence of Manifestation & Suppression on Perceived Discrimination, Job Satisfaction, & Turnover Intentions*, 18 Cultural Diversity and Ethnic Minority Psychol. 165 (2012).....11, 16, 17

Maykel Verkuyten, *Perceived Discrimination and Self-Esteem Among Ethnic Minority Adolescents*, 138 J. Soc. Psychol. 479 (1998).....9

Michael T. Schmitt et al., *The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analytic Review*, 140 Psychol. Bull. 921 (2014).....8

Michael Wallace et al., *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, 1 Soc. Currents 189 (2014).....14

Mona Amer & Joseph Hovey, *Anxiety & Depression in a Post-September 11 Sample of Arabs in the USA*, 47 Soc. Psychiatry & Psychiatric Epidemiology 409 (2012).....8, 9, 12, 13

Nick Hopkins & Ronni Michelle Greenwood, *Hijab, Visibility and the Performance of Identity*, 43 Eur. J. Soc. Psychol. 438 (2013) 15

Pew Research Center, *How Americans Feel About Religious Groups* (July 6, 2014), http://www.pewforum.org/files/2014/07/Views-of-Religious-Groups-09-22-final.pdf (last visited Dec. 3, 2014) 5, 6

Renate Ysseldyk et al., *Coping With Identity Threat: The Role of Religious Orientation & Implications for Emotions & Action Intentions*, 3 Psychol. Religion & Spirituality 132 (2011).....9, 10

Rhys H. Williams & Gira Vashi, *Hijab and American Muslim Women: Creating the Space for Autonomous Selves*, 68 Soc. Religion 269 (2007) 15-16

Sonia Ghumman & Ann Marie Ryan, *Not Welcome Here: Discrimination Towards Women Who Wear the Muslim Headscarf*, 66 Hum. Relations 671 (2013) 16

Sonia Ghumman & Linda Jackson, *The Downside of Religious Attire: The Muslim Headscarf and*

Expectations of Obtaining Employment, 31 J. Organizational Behav. 4, (2010) 16

Tanenbaum Center for Interreligious Understanding, ***What American Workers Really Think About Religion: Tanenbaum's 2013 Survey Of American Workers & Religion*** 5 (2013), http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks 12

Terrie C. Reeves et al., ***Muslim Women's Workplace Experiences: Implications for Strategic Diversity Initiatives***, 32 Equality, Diversity, & Inclusion: Int'l J. 49 (2012) 16

What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities, Equal Employment Opportunity Comm'n, http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_9-11.cfm (last visited Dec. 2, 2014) 7

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae Umme-Hani Khan is an observant Muslim. As was the case with Samantha Elauf, Abercrombie & Fitch ("Abercrombie") discriminated against Ms. Khan and denied her equal employment opportunity because she wore a hijab.[2]

Ms. Khan believes Islam requires her, in the interest of personal modesty, to wear a hijab when she is in public or in the presence of men who are not immediate family members. In October 2009, when she was nineteen, Ms. Khan was hired to work at Abercrombie's "Hollister"-branded store in San Mateo, California. Abercrombie interviewed Ms. Khan while she was wearing her hijab, and during her employment over the following four months, Ms. Khan was permitted to wear her hijab at all times

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[1] No person other than the *amicus curiae* or her counsel has made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any party authored this brief in whole or in part. Counsel of record for all parties have consented to the filing of this brief, and the letters of consent have been filed with, or will be sent to, the Clerk.

[2] "Hijab is an Arabic word meaning barrier or partition." BBC, *Hijab*, Religions - Islam: Hijab, http://www.bbc.co.uk/religion/religions/islam/beliefs/hijab_1.shtml (last updated Sep. 3, 2009). "It is the principle of modesty and includes behaviour as well as dress for both males and females. The most visible form of hijab is the head covering that many Muslim women wear." *Id.*

while performing her work duties. Ms. Khan's supervisors saw her as an excellent employee.

In February 2010, a visiting Abercrombie district manager observed Ms. Khan wearing her hijab while she worked. He believed that her hijab violated the company's "Look Policy"—Abercrombie's dress and grooming rules regulating its employees' appearance and the clothing they must wear at work. The Look Policy, among other things, prohibited employees from wearing "headwear." Abercrombie's corporate human resources office thereupon asked Ms. Khan to take off her hijab while she worked. When Ms. Khan responded that her religion did not permit her to do so, Abercrombie suspended her without pay. About two weeks later, Abercrombie called Ms. Khan back and asked her again to remove the headscarf. After Ms. Khan stated once more that she was required by her religion to wear her hijab and that she could not remove it at work, Abercrombie fired her. During her four months of employment, Abercrombie had not received a single complaint or negative comment from anyone regarding Ms. Khan or her presence in the store. Ms. Khan's religiously-based refusal to remove her hijab was the sole reason for her suspension and termination.

Because of these events, Ms. Khan suffered both emotional and dignitary harms. When Abercrombie suspended her, Ms. Khan left the Hollister store in tears, humiliated and not understanding why she was being told that she

would have a renounce a fundamental aspect of her identity in order to keep her job. When Abercrombie terminated her, Abercrombie in effect signaled that Ms. Khan did not fit the company's "All-American" image, and that she was less worthy than her peers, despite her excellent record of employment. The entire experience, regrettably, caused Ms. Khan to question whether she would ever be accepted as an American.[3]

In September 2013, the United States District Court for the Northern District of California determined that Abercrombie had refused to reasonably accommodate Ms. Khan's sincerely-held religious beliefs in violation of Title VII. Finding that Abercrombie could provide no business justification for its insistence that Ms. Khan remove her hijab, the district court entered summary judgment as to liability in her favor. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 965 (N.D. Cal. 2013).

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[3] Although Hani describes herself as a "typical American girl," after she was asked to remove the scarf for a second time by Abercrombie, she cried because she "never had a negative experience with [her] hijab before, even after 9/11." Hani Khan, *Hani Khan, in* Patriot Acts: Narratives of Post-9/11 Injustice 165, 167 (Alia Malek ed., 2011). After press releases were sent out about her Equal Employment Opportunity Commission complaint, she received multiple death threats, including one stating that "someone should behead [her] wrap [her] in a pig carcass and bury it in a mosque." *Id.* at 168.

Because of her personal experiences confronting discrimination on account of her hijab, and her own struggle to vindicate her civil right to observe her religion in the workplace, Ms. Khan has an interest in the outcome of the within matter. She seeks leave to file this brief in the hope this Court will act to ensure that others like herself will not be compelled, as she was, to choose between observing her faith and earning a paycheck.

SUMMARY OF ARGUMENT

Discrimination, like that suffered by Samantha Elauf and Hani Khan, poses a real and significant harm to the people discriminated against and to our society as a whole. People who are subjected to bias on account of their protected status often feel humiliated. As a result, they suffer higher levels of anxiety and depression, and decreased self-esteem and overall psychological well-being. At the same time, discrimination results in decreased job satisfaction and frequent job turnover—both of which are economically costly to society. Considering the increased likelihood that Muslims are viewed negatively by the public and face discrimination by employers today, the Court should carefully reconsider the prudence of placing the burden of requesting a religious accommodation on individual applicants in the manner that Abercrombie urges upon this Court.

ARGUMENT

Americans view Muslims more negatively than other religious groups. Pew Research Center, *How Americans Feel About Religious Groups* (July 6, 2014), http://www.pewforum.org/files/2014/07/Views-of-Religious-Groups-09-22-final.pdf (last visited Dec. 3, 2014) (finding that, on a "feeling thermometer" from 0 to 100, with 0 degrees meaning the participant felt as cold and negative as possible and 100 degrees meaning the participant felt as warm and positive as possible, "[f]ully 41% of the public rates Muslims in the coldest part of the thermometer (33 or below)"); Arab American Institute, *American Attitudes Toward Arabs and Muslims: 2014* (2014), *available at* http://b.3cdn.net/aai/3e05a493869e6b44b0_76m6iyjon.pdf (finding that, among the major religions in the United States, the public had the fewest favorable opinions and most unfavorable opinions about Arabs and Muslims). In fact, the Arab American Institute observed that, since it first began polling on American attitudes toward Arabs and Muslims in 2010, there has been continued erosion in the favorable ratings given to both Arabs and Muslims. Arab American Institute, *supra*, at 3 (finding that "[f]avorable attitudes have continued to decline—from 43% in 2010 to 32% in 2014 for Arabs; and from 35% in 2010 to 27% in 2014 for Muslims.").

Generally, this hostility turns at best into neutrality when the person polled personally knows

a Muslim. Pew Research Center, *supra*, at 10 ("Muslims get a neutral rating (49 on average) from those who know a Muslim, and a 'cooler' rating (35) from those who do not know a Muslim."). *Cf.* Arab American Institute, *supra*, at 5 ("Those who do not know an Arab or Muslim are more likely to view the groups unfavorably, in both instances and favorable attitudes nearly double when the person personally knows an Arab or Muslim."). In other cases, however, these attitudes have hardened into overt Islamophobia, which some in our nation have sought to institutionalize. As of May 2013, lawmakers in 32 states have introduced and debated bills "whose goal is the demonization of the Islamic faith." Fazia Patel et al., *Foreign Law Bans* (May 23, 2013), https://www.americanprogress.org/issues/security/report/2013/05/16/63540/foreign-law-bans/. In 2013, two of these bills, in Oklahoma and North Carolina, both banning the use of "foreign law," i.e., Islamic law or Sharia law in state courts, have been enacted into law.[4] *Id.*

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[4] "These laws, which have passed in [eight] states, are the brainchild of anti-Muslim activists bent on spreading the illusory fear that Islamic laws and customs (also known as Shariah) are taking over American courts." Fazia Patel & Amos Toh, *Commentary: The Clear Anti-Muslim Bias Behind Anti-Shariah Laws*, Wash. Post (Feb. 21, 2014), http://www.washingtonpost.com/national/religion/commentary-the-clear-anti-muslim-bias-behind-anti-shariah-laws/2014/02/21/381d7a7a-9b30-11e3-8112-52fdf646027b_story.html; Greg Garrison, *Amendment Banning 'Foreign Law' in Alabama Courts Passes; Will Be Added to Alabama Constitution*, AL.com, (Nov. 04, 2014, 11:40 PM), http://www.al.

These attitudes are also manifest in the employment context. Following the terrorist attacks of September 11, 2001, the Unites States Equal Employment Opportunity Commission ("EEOC") saw a "250% increase in the number of religion-based discrimination charges involving Muslims." *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities*, Equal Employment Opportunity Comm'n, http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_9-11.cfm (last visited Dec. 2, 2014). Since then, the number of such charges involving Muslims has only grown. *Id.*

As these statistics show, Muslims are one of the most disfavored religious groups in the United States. It is for this reason that the courts must be particularly vigilant in ensuring that employment practices that tend to discriminate against the Muslim community are acknowledged as such, and forthrightly addressed. This is particularly the case in view of the serious emotional, psychological, and economic impacts of such discrimination.

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com/news/index.ssf/2014/11/amendment_banning_foreign_law.html.

A. Discrimination Has Numerous Adverse Effects Upon Individuals' Mental Health.

Extensive social science research has borne out that being subjected to bias on account of one's protected status or its traits and characteristics can lead to higher levels of anxiety and depression, and decreased self-esteem and overall psychological well-being. *See* Michael T. Schmitt et al., *The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analytic Review*, 140 Psychol. Bull. 921 (2014) (synthesizing results from previous studies and finding that discrimination has a statistically significant, negative impact upon well-being). This study concluded that people are more likely to consider discrimination "pervasive" when they encounter it and have to justify it across a variety of social contexts. *Id.* at 935. When people perceive discrimination as pervasive, their psychological well-being decreases. *Id.* This effect on well-being appears to be harsher among disadvantaged groups than among groups with higher social status. *Id.*

Those who are regularly discriminated against, for example, have higher levels of anxiety and depression. In one study, a post-September 11th group of Arab Americans completed a series of questionnaires related to cultural assimilation, mental health, and social support. Mona Amer & Joseph Hovey, *Anxiety & Depression in a Post-*

September 11 Sample of Arabs in the USA, 47 Soc. Psychiatry & Psychiatric Epidemiology 409, 411 (2012). The results showed that one-fourth of the participants reported moderate or severe anxiety, while one-half reported depression, both at rates significantly higher than the levels reported by the population at-large. *Id.* at 413.

Similarly, individuals who feel they have been discriminated against not only experience lower self-esteem, but also perceive that they have less control over outcomes and events. *See* Maykel Verkuyten, *Perceived Discrimination and Self-Esteem Among Ethnic Minority Adolescents*, 138 J. Soc. Psychol. 479, 491 (1998). In this study, participants completed questionnaires that asked them about their self-esteem, to what extent they felt personally discriminated against, and how often they experienced subtle acts such as name-calling. The researchers determined that participants who perceived more discrimination—either subtle or overt—had lower self-esteem than those who did not perceive that they had been discriminated against. *Id.* at 483-91.

Threats to one's religious identity, in particular, can lead to increased sadness. *See* Renate Ysseldyk et al., *Coping With Identity Threat: The Role of Religious Orientation & Implications for Emotions & Action Intentions*, 3 Psychol. Religion & Spirituality 132 (2011). In this study, people who self-identified as belonging to a religious group received information intentionally designed to

threaten their religion. *Id.* at 136. Researchers presented the participants with fictitious survey results filled with insults about their religious group. *Id.* The participants were also informed that, as a result of the survey, the government would decrease its funding to that particular religious group. *Id.* Researchers found that when they threatened the participants' religion in this way, the participants experienced greater sadness and anger. *Id.* at 138.

In the workplace, the effects of discrimination can be particularly acute. As one scholar has stated, the workplace has emerged as the "single most important site of cooperative interaction and sociability among adult citizens outside the family." Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 Geo. L.J. 1, 3 (2000); *see also* Eddie A. Jauregui, *The Citizenship Harms of Workplace Discrimination*, 40 Colum. J.L. & Soc. Probs. 347, 359-363 (2007) (observing the primacy of workplaces and noting that employment discrimination can result in individuals feeling like they are less than full citizens). As such, discrimination—whether in the form of biased workplace policies or biased behavior, such as decreased eye contact, terse interpersonal interactions, and rudeness—has an adverse effect on job satisfaction and employee turnover. When employees feel they must suppress their identity in their workplaces, their perceptions of discrimination

increase and their job satisfaction decreases.[5] Juan M. Madera et al., *Bringing Social Identity to Work: The Influence of Manifestation & Suppression on Perceived Discrimination, Job Satisfaction, & Turnover Intentions*, 18 Cultural Diversity and Ethnic Minority Psychol. 165, 168 (2012). Research also suggests that such discrimination may lead individuals to forgo opportunities and to avoid situations in which they might expose themselves to further stereotyping. *See* Elizabeth Pinel, *Stigma Consciousness: The Psychological Legacy of Social Stereotypes*, 76 J. Personality & Soc. Psychol. 114 (1999). One study found that in a competitive "Jeopardy"-type game scenario, people who expected to be stereotyped by their opponent avoided categories of questions that could confirm any negative or stereotypical views that the opponent might hold. For example, women avoided topics like "automobile names" and "the military." *Id.* at 125. Extended to the employment context, these results suggest that employees who face discrimination may forego opportunities for professional advancement solely because of fears that their performance would confirm negative stereotypes and biases. This necessarily places them at a disadvantage relative to their coworkers who do not face discrimination and

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[5] These effects are also present when discrimination is subtle, and research has shown that minor, everyday discrimination is pervasive in the employment context. *See* Elizabeth A. Deitch et al., *Subtle Yet Significant: The Existence and Impact of Everyday Racial Discrimination in the Workplace*, 56 Human Relations 1299 (2003).

who, consequently, do not avoid opportunities for professional growth for those reasons.

Recent findings indicate that religious discrimination in the workplace is widespread. One survey, in fact, found that fully a third of all respondents had either witnessed incidents of religious bias or been confronted with such bias themselves. *See* Tanenbaum Center for Interreligious Understanding, *What American Workers Really Think About Religion: Tanenbaum's 2013 Survey Of American Workers & Religion* 5 (2013), http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf (last visited Dec. 3, 2014). In light of the documented harms of discrimination upon mental well-being, the prevalence of religious bias in the workplace is deeply troubling.

B. Discrimination Has Particularly Harsh Impacts Upon Muslim Americans.

Researchers who have studied the psychological health of Arab American communities in the United States have found that they experience greater anxiety and depression as compared to other racial or ethnic groups. *See* Amer & Hovey, *supra*, at 413. The stressors Arab Americans face "are uniquely compounded by the heightened and ongoing pressures directed against Arab Americans, especially Muslims. Examples include profiling, discrimination, and biased anti-Arab media.

[S]uch experiences of perceived hostility and discrimination were associated with greater psychological distress." *Id.* at 415. These effects appear to be particularly marked for Muslim immigrants because "they have been traditionally subjected to much higher levels of discrimination than other racial/ethnic groups." Azadeh Ghaffari & Ayşe Çiftçi, *Religiosity and Self-Esteem of Muslim Immigrants to the United States: The Moderating Role of Perceived Discrimination*, 20 Int'l J. for Psychol. Religion 14, 15 (2010). For Muslim men, "the greater the perception of a discriminatory and hostile environment, the greater the amount of suspicion, mistrust, and wariness" that Muslim men feel towards others. Alyssa E. Rippy & Alana Newman, *Perceived Religious Discrimination and Its Relationship to Anxiety and Paranoia Among Muslim-Americans*, 1 J. Muslim Mental Health 5, 15 (2006).

Muslim women are at an increased risk of discrimination-related depression and anxiety. Dena Hassouneh & Anahid Kulwicki, *Mental Health, Discrimination, and Trauma in Arab Muslim Women Living in the US: A Pilot Study*, 10 Mental Health, Religion, & Culture 257 (2007). One study found that 63% of Muslim women reported increased discrimination following September 11th. *Id.* at 260. The types of discrimination reported varied: 10% had been hit or handled roughly; 53% had been called names or insulted; 67% experienced rude treatment; 57% experienced unfair treatment; 27% were either

refused service or experienced delays in service in a store or restaurant; 33% had been excluded or ignored by members of other groups at least one time; and 50% reported discrimination against a family member. *Id.* Most importantly, 77% experienced distress "sometimes or most of the time during incidents of discrimination," a clear indicator of the negative impacts upon their psychological well-being. *Id.* at 260-61.

Studies assessing discrimination against Arabs and Muslims in the employment context have documented the presence of substantially biased attitudes against them. Two studies conducted by the University of Connecticut found that résumés which in any way indicated that the potential applicant was Muslim received the fewest responses from employers. Bradley R. E. Wright et al., *Religious Affiliation and Hiring Discrimination in New England: A Field Experiment*, 34 Research in Social Stratification and Mobility 111 (2013) ("Muslim applicants received one-third fewer responses from employers, either as phone calls or e-mails, than did the control group."); Michael Wallace et al., *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, 1 Soc. Currents 189 (2014) ("In general, Muslims, pagans, and atheists suffered the highest levels of discriminatory treatment from employers, a fictitious religious group and Catholics experienced moderate levels, evangelical Christians encountered little, and Jews received no discernible discrimination."). A

similar study revealed that 1.89% of Arab job applicants received callbacks for an interview, compared to a figure of 5.28% for white applicants who used similar résumés. Daniel Widner & Stephen Chicoine, *It's All in the Name: Employment Discrimination Against Arab Americans*, 26 Soc. F. 806, 815 (2011). The only difference between the résumés was the names—one résumé had a name associated with Arab ethnicity, while the other had a name associated with white ethnicity. *Id.* at 809. Prior to using the names, the researchers used an independent study to confirm that people who encountered the names associated them with either Arabs or whites. *Id.* at 813.

C. Religious Discrimination May Have Serious Implications for the Mental Health of Muslim Women Who Wear a Hijab.

Research confirms that the decision to wear a hijab is a deeply personal one that impacts an individual's sense of identity. *See* Nick Hopkins & Ronni Michelle Greenwood, *Hijab, Visibility and the Performance of Identity*, 43 Eur. J. Soc. Psychol. 438 (2013). As one study found, "wearing hijab could be bound up with wishing to make one's [religious] identity visible," which "could be associated with ambitions to exert control over one's categorisation." *Id.* at 442. Thus, wearing the hijab may be a response "to living as young women in a nexus between two cultures and as members of a minority

faith." Rhys H. Williams & Gira Vashi, *Hijab and American Muslim Women: Creating the Space for Autonomous Selves*, 68 Soc. Religion 269, 285 (2007).

Despite the central role of hijab in defining religious identity, women wearing it experience discrimination in hiring. One study found that women who requested job applications while wearing a hijab received fewer applications and call backs, experienced shorter interactions, and perceived less interest from prospective employers than when they did not wear a hijab. Sonia Ghumman & Ann Marie Ryan, *Not Welcome Here: Discrimination Towards Women Who Wear the Muslim Headscarf*, 66 Hum. Relations 671, 688 (2013). Similarly, hijabis in a separate study reported that they "felt uncomfortable wearing hijab in the workplace."[6] Terrie C. Reeves et al., *Muslim Women's Workplace Experiences: Implications for Strategic Diversity Initiatives*, 32 Equality, Diversity, & Inclusion: Int'l J. 49, 60 (2012). This discomfort and discrimination may cause hijabis to suppress their religious identity. *See* Madera et al., *supra*. As previous studies confirm, suppression of group identity may lead not only to the mental health harms discussed above, but may

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[6] Studies have shown that formal and interpersonal discrimination leads hijabis to experience lower expectations of receiving a job offer. This is particularly true for jobs that involve high public contact, as opposed to low public contact. *See* Sonia Ghumman & Linda Jackson, *The Downside of Religious Attire: The Muslim Headscarf and Expectations of Obtaining Employment*, 31 J. Organizational Behav. 4, 17 (2010).

also have injurious effects on job satisfaction and lead people to seek new employment, thereby increasing job turnover rates. *See id.* at 168.

D. Discrimination Has Economic Effects.

The detrimental effects of discrimination are not limited to the person who is discriminated against. Employment discrimination also has detrimental effects on the economy. For example, the hostile work environment caused by discrimination against gay and transgender persons alone has been estimated to cost companies $1.4 billion in lost output every year, suggesting that the cost of discrimination as a whole far exceeds $1.4 billion. Crosby Burns, *The Costly Business of Discrimination, The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* 3, 13 (2012), http://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf (last visited Dec. 3, 2014).

Additionally, high turnover costs businesses money—when employees resign, companies lose the investment they made in that employee. *Id.* at 11. They also spend anywhere between $5,000 and $10,000 to replace an hourly worker. *Id.* For salaried employees, this amount is even higher—estimates show that turnover costs the employer "1.5 times the total annual compensation of the employee lost, primarily due to recruiting and training." Level

Playing Field Institute ("LPFI"), *The Corporate Leavers Study: The Cost of Employee Turnover Due Solely to Workplace Unfairness* 18 (2007), http://www.lpfi.org/sites/default/files/corporate-leavers-survey.pdf (last visited Dec. 3, 2014). Thus, the cost of replacing a professional is approximately $146,516. *Id.*

CONCLUSION

Amicus curiae Umme-Hani Khan respectfully requests that the Court remain cognizant of the individual and social harms that will result if the employment practices at issue here are found permissible despite Title VII's prohibitions against religious discrimination in the workplace.

Respectfully submitted,

CHRISTOPHER HO
Counsel of Record
MARSHA J. CHIEN
THE LEGAL AID SOCIETY –
EMPLOYMENT LAW CENTER
180 Montgomery Street, Suite 600
San Francisco, California 94104
(415) 864-8848
cho@las-elc.org

ZAHRA BILLOO
FATIMA IQBAL
COUNCIL ON AMERICAN-ISLAMIC
RELATIONS – CALIFORNIA CHAPTER
3000 Scott Blvd., Suite 101
Santa Clara, California 95054
(408) 986-9874
fiqbal@cair.com

Counsel for Amicus Curiae
UMME-HANI KHAN

December 9, 2014

No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONER

GREGORY R. NEVINS
Counsel of Record
Lambda Legal Defense
and Education Fund, Inc.
730 Peachtree Street, NE
Suite 1070
Atlanta, GA 30308
(404) 897-1880
gnevins@lambdalegal.org

JENNIFER C. PIZER
Lambda Legal Defense
and Education Fund, Inc.
4221 Wilshire Blvd.,
Suite 280
Los Angeles, CA 90010
(213) 382-7600

Counsel for Amicus Curiae

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

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Jennifer Pizer, *et al.*, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A.L. Rev. 715 (2012) 26

INTEREST OF *AMICUS CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education and policy advocacy.[1] *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003). Lambda Legal often is counsel of record or *amicus curiae* in cases posing issues regarding the asserted religious needs of a party. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*amicus*); *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (rejecting claim that counseling student's speech and religious exercise rights warranted exemption from university's requirement that she counsel lesbian and gay clients per professional standards) (*amicus*); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (rejecting claim that nondiscrimination statute infringed physician's speech and religious exercise rights) (counsel). Lambda Legal also is often counsel or *amicus curiae* in cases addressing Title VII's protection of LGBT workers. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (*amicus*); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (brought under 42 U.S.C. § 1983 but decided

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

on Title VII principles) (counsel); *Kastl v. Maricopa Cty. Cmty. College Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009) (*amicus*); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063, 1068 (9th Cir. 2002) (en banc) (*amicus*); *TerVeer v. Billington*, No. 12-1290, 2014 U.S. Dist. LEXIS 43193 (D.D.C. Mar. 31, 2014) (*amicus*); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (counsel). In letters to each house of Congress, and in comments to the Equal Employment Opportunity Commission, Lambda Legal has addressed the failure of some courts to protect the rights of LGBT employees from discrimination based on sex or religion, due to misapplying the law governing Title VII's coverage.

SUMMARY OF ARGUMENT

Would the interests of justice, economy, and clarity be served by a bright-line rule that requires the employee to initiate an interactive process about religious accommodations by informing the employer of his or her religious needs that conflict with the needs or rules of the employer? While the substantive answer to that question may be debatable, this Court's response seems preordained: In the absence of any language in Title VII suggesting that a religious discrimination claim fails unless the employer's actual knowledge of the need for an accommodation comes from the employee, it is up to Congress, not the courts, to superimpose any such requirement on Title VII plaintiffs.

Lambda Legal writes as a friend of this Court to put in context the Tenth Circuit's ruling as part of a disturbing tendency of lower courts to ignore this Court's repeated and often unanimous rulings

striking down judicially-imposed hurdles to claims that fall within Title VII's language, including facially valid claims brought by LGBT workers. If there is one overarching tenet of this Court's Title VII jurisprudence, it is that courts should not superimpose non-statutory rules and prerequisites that have the effect of screening out claims that "meet[] the statutory requirements." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 80 (1998). The related corollary is that a court that applies the literal terms of Title VII to allow a claim that members of Congress may not have envisioned should not be concerned, but commended for doing its job. Again, if there is a concern about unintended consequences, Congress can always respond to those. Yet, time and again, the lower courts ignore this Court's rulings and, with no statutory support, place limits on the claims of Title VII plaintiffs. These courts often explain their limit-setting as serving interests in having "clear rules" or ensuring that courts serve *only* those objectives that a court thinks Congress intended in passing Title VII. *Amicus* respectfully requests that this Court yet again admonish against this judicial practice in the strongest possible terms. This case involves an improper judicial prerequisite that has no basis in Title VII. Indeed, this judicially created hurdle runs counter to both the language and the purposes of the statute because it immunizes an employer's rejection of an applicant based on the employer's assumptions concerning her religion and religious needs, and also immunizes the employer's failure either to accommodate the applicant's actual religious needs or to "demonstrate" that no reasonable

accommodation was possible without undue hardship.

ARGUMENT

I. Title VII Is Devoid Of Any Requirement That The Religious Practice That An Employer Invokes To Disqualify An Applicant Be Specifically Called To The Employer's Attention By That Applicant.

The lower court's ruling proceeds, as many other mistaken Title VII rulings do, with assumptions, generally applicable and appropriate, about what should occur prior to an employee or applicant bringing a Title VII claim. Here, that is an interactive process between an employee and an employer regarding the conflict between the employee's religious needs and the employer's needs or rules – a conflict that, if not properly resolved, can subject the employer to liability under 42 U.S.C. § 2000e(j). *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) ("The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate an employee's religious observance or practice without undue hardship on the conduct of the employer's business.' 42 U. S. C. § 2000e(j)."). The sponsor of Section 2000e(j) expressed the hope that employers would make accommodations "with 'flexibility' and 'a desire to achieve an adjustment.'" *Ansonia*, 479 U.S. at 68. This Court observed that, to achieve that goal, "'bilateral cooperation is appropriate '" *Ansonia*, 479 U.S. at 69, quoting 118 Cong. Rec. 706 (1972) and *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982). And indeed, this Court's

observation is, if anything, an understatement, given the difficulty of prevailing in court for either the employer or employee who refuses to engage in an interactive process regarding religious accommodations.[2]

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[2] Of course, the fact that an interactive process is not statutorily required does not mean that employers and employees can forego "bilateral cooperation" and still be able to prevail in a religious accommodation lawsuit. Most of the time, the employer refuses to engage in or pretermits an interactive process at its peril. *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2008) ("But these decision-makers did not consult local [] managers to determine whether there were additional procedures, formal or informal, that could be employed to help Sturgill avoid Friday work conflicts in the interim."); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989) ("Although conceivable," employers escaping liability without an interactive process "will also be rare. We therefore will be 'skeptical of hypothetical hardships.'") (citation omitted); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) ("The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."); *see generally Toledo*, 892 F.2d at 1490 (pointing out the fact-intensive judicial inquiry an employer will have to satisfy to resolve the "issue of undue hardship without some background of attempted or proposed accommodation"). Similarly, it would be rare for an employee to prevail against an employer's application of a neutral attendance policy if she never initiates an interactive process by informing the employer of temporal work restrictions See *Johnson v. Angelica Unif. Grp., Inc.*, 762 F.2d 671, 673 (8th Cir. 1985) ("Had Johnson informed [a] supervisor of her need for religious accommodation , her employer would have had the chance to explain the absentee policy in relation to Johnson's religious needs, and perhaps work out an arrangement satisfactory to both parties.").

However, the Tenth Circuit has gone too far in converting this Court's observation[3] than an interactive process is "appropriate" into an absolute prerequisite that such a process must occur *and* must be initiated by the employee or applicant herself informing the employer of her religious needs. *See Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (Title VII's framework "involves an interactive process that requires participation by both the employer and the employee."); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1125 (10th Cir. 2014) ("we are not convinced that we are at liberty to disregard the plain terms of our *Toledo* and *Thomas* decisions, which place the prima facie burden on the plaintiff to establish that the applicant or employee has initially informed the employer of the conflicting religious practice and the need for an accommodation.") ("*EEOC v. A&F*").[4]

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[3] It is especially inappropriate to rely on this Court's decision in *Ansonia*, as the Tenth Circuit did, as mandating an interactive process, when such a process did occur there and thus the existence thereof was not disputed in that case. In *Ansonia*, the employee offered his proposed reasonable accommodation, and the employer rejected that approach but offered alternative reasonable accommodations. 479 U.S. at 66. The lower court in that case held the employer liable, believing there to be an employer obligation to accept any reasonable accommodation suggested by the employee. *Id.* This Court reversed, holding that an employer discharges its statutory duty by offering a reasonable accommodation for the employee's religious needs. *Id.* at 69.

[4] As explained further *infra*, it is curious that the court below relied on *Toledo* in holding that there *must* be an interactive process (and that the employee must initiate it) when *Toledo*

The lower court decision makes this mistake by not analyzing the statutory language at all, but merely mentions it in passing reference.[5] There is no requirement in the statute's language that there be an interactive process, let alone a requirement as to who initiates that process or how it must be initiated. The requirement that the employer be aware of the conflict between its needs and the employee's religious needs stems from the statutory requirement of a showing that the employer acted because of the employee's religion; the courts that have actually addressed the issue have found that element satisfied by evidence that the employer had sufficient information, from any source, to be aware

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rejected an argument that the employer always loses if it does not engage in an interactive process. *Toledo*, 892 F.2d at 1489 ("it is certainly conceivable that particular jobs may be completely incompatible with particular religious practices. It would be unfair to require employers faced with such irreconcilable conflicts to attempt futilely to resolve them."). In *Toledo*, the applicant informed the employer during the interview "that he was a member of the Native American Church, and had used peyote as part of church ceremonies. Toledo described the purpose of the ceremonies, and indicated he had used peyote twice in the previous six months." 892 F.2d at 1484. In response, neither the interviewer, nor the director of personnel with whom the interviewer spoke "discussed or attempted accommodation of Toledo's religious practices" at any time before Toledo filed an administrative claim in response to being told he would not be hired. *Id.*

[5] The only citations to Title VII provisions in the opinion below are the description of the complaint filed in the action and a mere recitation, without analysis, of the antidiscrimination and accommodation commands and the definitions of "religion" and "agent." *EEOC v. A&F*, 731 F.3d at 1110, 1116, 1120, 1125 n.8.

of the conflict.[6] And the absence of an absolute prerequisite of an interactive process goes both ways, as reflected in the universal recognition, consistent with the language of Title VII, that an employer can defeat a claim of religious discrimination, even without engaging in any process, if it shows that all possible accommodations of the religious need would cause it an undue hardship. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 132-133 (1st Cir. 2004) (if the only accommodation acceptable to the employee "would impose an undue hardship on" the employer, it "has no obligation to offer an accommodation before taking an adverse employment action.").[7]

Thus, the lower court's imposition of a requirement that an interactive process must occur and must be initiated by the employee or applicant—whether or not she is informed that she is being rejected because of assumptions about her religious practices—was improper. Any immunizing of a failure even to attempt to accommodate religious needs that the employer knows about – from any source – contravenes Title VII's requirement that the

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[6] *See, e.g., Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1158 (1996); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999).

[7] *Accord Weber v. Roadway Express, Inc.*, 199 F.3d 270, 275 (5th Cir. 2000); *Balint v. Carson City*, 180 F.3d 1047, 1052 n.4 (9th Cir. 1999) (Title VII does not require "such an effort if the employer can show that any accommodation would impose an undue burden."); *Toledo*, 892 F.2d at 1489; *Draper*, 527 F.2d at 520.

employer "demonstrate" that it reasonably accommodated the employee's needs or could not do so without undue hardship. *Ansonia*, 479 U.S. at 68. This Court has been clear that the use of the word "demonstrate" means what Congress said it means – no less and no more. *Desert Palace v. Costa*, 539 U.S. 90, 99 (2003) ("Title VII defines the term 'demonstrates' as to 'meet the burdens of production and persuasion.' § 2000e(m)."). In a religious accommodation case, the burden, per statute, is on the employer.

It also cannot be ignored, especially here, that the interactive process contemplated by the courts is applicable when *the employee seeks an accommodation* such as an exception to an employer's explicit, generally-applicable policy or scheduling. EEOC Compliance Manual § 12-IV. OVERVIEW ("An applicant or employee *who seeks* religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work.") (emphasis supplied); *see also Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013) ("an employee *who wants to invoke* an employer's duty to accommodate his religion under Title VII must give the employer fair notice of his need for an accommodation and the religious nature of the conflict.") (emphasis supplied). That is not the case here, as applicant Elauf affirmatively had been led to believe, prior to her interview, that wearing a headscarf was not a problem, a belief only reinforced by her wearing a headscarf during her interview, being informed of various dress restrictions, but not being told of any

concern with headscarves. *EEOC v. A&F*, 731 F.3d at 1113.

But even in the case of an employee affirmatively seeking an exception from a known, generally-applicable rule, "No 'magic words' are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement." EEOC Compliance Manual at § 12-IV(A)(1). "[T]he applicant or employee must provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." *Id.* While the Tenth Circuit repeatedly seized on the "employee must provide" language in the Compliance Manual, see *EEOC v. A&F*, 731 F.3d at 1135, 1136, 1139, the EEOC manual only requires an applicant to "provide enough" information; it nowhere says that the applicant has to "convey herself, and not through others, specific and definitive verbal" information. If wearing a headscarf to an interview with an employer who forbids headscarf wearing in the workplace is not "provid[ing] enough information" about a potential conflict over such a ban, it is hard to imagine what is.

II. The Tenth Circuit's Decision Has The Effect Of Disqualifying A Claim Where The Employer Has Not Discharged Its Statutory Burden Of Demonstrating Either That It Offered A Reasonable Accommodation Or That It Could Not Do So Without Undue Hardship.

A court is obligated to entertain any Title VII claim that meets the statutory requirements. A court cannot invoke its preferred rules, or even a preference for clear rules, to reject a claim falling within Title VII's terms. And this Court has unanimously condemned the practice of trying to divine what Congress specifically intended to accomplish by passing Title VII, and allowing only claims consistent with that supposed vision and rejecting other claims that the words of Title VII encompass. The lower court ruling runs afoul of these basic principles.

a. The Tenth Circuit Decision Runs Afoul Of *Oncale*'s Command That Courts Entertain All Claims That "Meet The Statutory Requirements" Of Title VII.

"It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) (citing *Oncale*). This Court unanimously held in *Lewis* that, if applying the textual words of Title VII leads to a situation where "Congress allowed claims to be brought against an employer" in an expansive fashion, and "that effect was unintended, it is a problem for congress, not one that federal courts can

fix." 560 U.S. at 216. *Lewis* and *Oncale* reflect the holding of a prominent early case that this Court has lauded and followed repeatedly,[8] in which the Fifth Circuit recognized that the broad scope of Title VII should not be judicially limited: "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).[9]

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[8] *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-67 (1986); *see also Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2440-2441 (2013) (describing *Rogers* as "the leading case" and characterizing the Court's holding in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) as "[c]onsistent with *Rogers*").

[9] Neither this case nor the issue of Title VII's coverage of sexual orientation or gender identity discrimination implicates an arguable concern that a literal reading of the statute affirmatively *subverts* the intent of Congress, as opposed to merely having the possibility of *unintended* consequences. *Cf. King v. Burwell*, 759 F.3d 358, 375 (4th Cir. 2014) ("The IRS Rule avoids both these unforeseen *and undesirable* consequences and thereby the true purpose and means of the Act.") (emphasis supplied), *cert. granted*,; 2014 U.S. LEXIS 7428 (November 7, 2014).

b. Courts Cannot Screen Out Claims Falling Within Title VII's Terms By Imposing Their Own Preferred Limitations, Regardless Of Interests In Having "Clear Rules."

Some courts have articulated blanket rules, unsupported by Title VII, that had the effect of potentially immunizing discriminatory conduct. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-458 (U.S. 2006) (per curiam) (unanimously rejecting circuit court's ruling that the decisionmaker's reference to each black plaintiff as "boy" was "not evidence of discrimination" as a matter of law); *id.* at 456-57 (castigating as "unhelpful and imprecise" the lower court's requirement that, to "infer[] pretext from superior qualifications," the disparity had to be "so apparent as virtually to jump off the page and slap you in the face.") (internal quotations and citations omitted); *see generally Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) (unanimously rejecting, under statute "very similar to Title VII," the lower court's unduly narrow view of bias as "motivating factor" in termination). In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), this Court unanimously cast aside the law of no fewer than four circuits that had held that a plaintiff must present "direct evidence" to establish "mixed motive" liability. *See id.* at 95 (citing cases). Similarly, in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), this Court unanimously rejected the Second Circuit's use of a heightened pleading standard for Title VII cases. *See id.* at 515; *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007) (under *Swierkiewicz*, a plaintiff need not "allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to

relief."). While *Swierkiewicz* discussed the Second Circuit's erroneous interpretation of the Federal Rules of Civil Procedure, the decision also explained another fundamental error wrought by approving the dismissal of the allegations: "they state claims upon which relief could be granted under Title VII and the ADEA." *Swierkiewicz*, 534 U.S. at 514. In *Reeves v. Sanderson Plumbing Products, Inc.*, this Court unanimously held that an employee is entitled to a jury if the employee refutes the employer's pretextual reason(s), pointing out that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review." 530 U.S. 133, 148 (2000); *see also Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002) (en banc) (accurately depicting *Oncale* as "[s]ticking to the statutory wording in reject[ing] various circuits' special requirements for same-sex sexual harassment cases."), *aff'd*, 539 U.S. 90 (2003).

This Court also has been met with pleas that some judge-made constraints on Title VII's scope are necessary in the interest of having "clear rules" that will serve the interest of judicial economy. Those arguments have been summarily rejected. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011) ("a preference for clear rules cannot justify departing from statutory text."); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 406 (2008) (EEOC filings "should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies. Construing ambiguities against the drafter may be *the more efficient rule* to encourage precise expression in other contexts; here, however, the rule would undermine the remedial scheme Congress

adopted.") (emphasis supplied). Thus, while clarity and judicial economy may be served by a clear, inflexible rule that an applicant or employee herself must always articulate the conflict between her religious needs and an employer need or policy, any imposition of such a rule would have to come from Congress, not the courts.

c. Courts Cannot Screen Out Claims Falling Within Title VII's Terms To Serve Policy Interests, Even Those They Deem In The Contemplation Of Congress.

To the extent that the Tenth Circuit relied on certain policy objectives for its ruling (such as not having employers probe into religion, a "uniquely personal and individual matter," see *EEOC v. A&F*. 731 F.3d at 1117, 1132), the decision below fares no better and indeed seems in defiance of this Court's unanimous rulings in *Oncale* and *Lewis*.

In the formerly influential same-sex harassment case of *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988),[10] the district court held that, even though a "wooden application of" the statutory words "because of such individual's sex" would lead to recognizing same-sex sexual harassment claims, the court "chooses instead to adopt a reading of Title VII consistent with the underlying concerns of Congress" that did not involve such claims. *Id.* at 1456. This

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[10] *See Williams v. District of Columbia*, 916 F. Supp. 1, 8 (D.D.C. 1996) (observing that courts that "have found that same-sex sexual harassment is beyond the reach of Title VII . . . all rely, directly or indirectly, upon the reasoning of *Goluszek*.")

Court unanimously rejected this policy-driven approach to interpreting Title VII in *Oncale*. Conceding that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," this Court held that that was not the proper inquiry. 523 U.S. at 79. Instead, *Oncale* pointed out that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

Thereafter, this Court in *Lewis* echoed the tenet that, when a claim falls within the reach of the statute, it should be allowed irrespective of policy-based warnings of adverse consequences. *Lewis*, at 216 (dismissing concerns about employers facing "new disparate-impact suits for practices they have used regularly for years" and the unavailability of "[e]vidence essential to their business-necessity defenses").

This Court also has rejected the notion that Title VII is concerned only with fair treatment, in the aggregate, of certain groups, such as African-Americans or women. For example, this Court rejected an employer suggestion that the claims of individual African-Americans could be dismissed if the employer showed that it generally had treated blacks fairly.

> Having determined that respondents' claim comes within the terms of Title VII, we must address the suggestion of an additional burden on plaintiffs or in the nature of an affirmative defense [for an employer]

> hiring or promoting a sufficient number of black employees to reach a nondiscriminatory 'bottom line.' We reject this suggestion, which is in essence nothing more than a request that we redefine the protections guaranteed by Title VII.

Connecticut v. Teal, 457 U.S. 440, 452-453 (1982); see also *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978) (rejecting higher pension plan payments for women, despite "unquestionably true" supporting actuarial data, because the statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin."), quoting 42 U. S. C. § 2000e-2 (a)(1) (emphasis added by Court).[11]

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[11] But the lower court here is not alone in improperly rejecting a Title VII religion claim in service of a perceived policy objective or intention of Congress. In *Prowel v. Wise Bus. Forms, Inc.*, 579 F.2d 285 (3d Cir 2008), the court acknowledged that "Title VII seeks to protect employees from forced religious conformity." 579 F.3d at 292 (citing cases). However, the court then held that where the employee can "identify just one" religious belief he did not live up to – "that a man should not lay with another man," then the Title VII claim fails. *Id.* at 293. The court proffered only one reason to reject what otherwise it recognized as a theoretically sound claim of religious discrimination: an intent by Congress, manifested nowhere in the language of Title VII, to foreclose all employment discrimination claims based on sexual orientation. *Id.* ("Given Congress's repeated rejection of legislation that would have extended Title VII to cover sexual orientation, we cannot accept Prowel's de facto invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality.") (citation omitted). So, a decade after

III. The Enactment Of The 1991 Civil Rights Act And The Americans With Disabilities Act In 1990 Illuminate The Error.

This Court has placed great weight on the significance of what amendments were and were not made in the Civil Rights Act of 1991 ("the 1991 Act."). *Univ. of Texas Southwestern Med. Center v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Especially significant in *Nassar* was the 1991 Act's failure to amend Title VII's anti-retaliation provision a year after Congress passed the Americans with Disabilities Act with very specific anti-retaliation provisions. 133 S. Ct. at 2531. Indeed, as a general matter, this Court has been notably hesitant to adopt

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this Court unanimously decreed in *Oncale* that courts should not attempt to discern what the 88th Congress wanted to cover and not cover in passing Title VII, the Third Circuit did exactly that, and then doubled down by relying on what subsequent Congresses did *not* do, ignoring this Court's repeated admonitions to the contrary. *E.g., Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("'[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress" especially concerning "a proposal that does not become law.") (internal citations and quotation marks omitted). At least three other circuits erroneously have cited the motivations of the 88th Congress and the inaction of Congress thereafter in similarly constraining Title VII's scope. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Vickers*, 457 F.3d at 765; *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005)). However, other courts have correctly realized that courts should not impose exceptions to Title VII's coverage. *Hall v. BNSF Ry. Co.*, No. C13–2160 RSM, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billington*, No. 12-1290, 2014 U.S. Dist. LEXIS 43193 *40 (D.D.C. Mar. 31, 2014); *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152, 1156 (N.D. Cal. 2001).

an employer's proposed, limiting statutory interpretation that Congress readily could have adopted but did not. *See, e.g., Thompson*, 131 S. Ct. at 869-870 (rejecting contention that "'person aggrieved' refers only to the employee who engaged in the protected activity. We know of no other context in which the words carry this artificially narrow meaning, and if that is what Congress intended it would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.'"); *Desert Palace*, 539 U.S. at 99 ("If Congress intended the term "'demonstrates'" to require that the "burdens of production and persuasion" be met by direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect in § 2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42."); *United Steelworkers v. Weber*, 443 U.S. 193, 205 (1979) ("Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have provid[ed] that Title VII would not require *or permit* racially preferential integration efforts" as opposed to merely using the word "require") (emphasis supplied).

Relevant here, and for LGBT employees, is the fact that the ADA included a provision requiring employers to accommodate "known physical or mental limitations" and an exclusion that "disability" would not include homosexuality or gender identity disorder. The failure to include either provision in the 1991 Act strongly indicates that there is no

"actual knowledge" requirement to trigger the employer's religious accommodation obligation, and that any individual experiencing mistreatment that would not have occurred but for his or her sex or religious nonconformity has a claim, even if that individual's sexual orientation or gender identity motivated the sex or religious discrimination.

In 1990, Congress passed the Americans with Disabilities Act. The ADA incorporated Title VII in significant parts. See 42 U.S.C. § 12117 ("The powers, remedies, and procedures set forth in section[s] 2000e-5 of this title shall be the powers, remedies, and procedures this title provides to the Commission or to any person alleging discrimination on the basis of disability"). The ADA also included its own reasonable accommodation requirement, making an employer liable for "not making reasonable accommodations to the known physical or mental limitations" of a qualified employee with a disability unless it demonstrates undue hardship. 42 U.S.C. § 12112(b)(5)(a). By contrast, 42 U.S.C. § 2000-e(j) contains no requirement that the employee's religious needs be known, but that implicit prerequisite flows from the need to demonstrate discrimination because of religion. But that implicit requirement should not be more demanding than the specific limitation of "known," in the ADA, especially given the 1991 Act's failure to amend Section 2000-e(j). And even the ADA standard has not been onerous, in keeping with the general understanding of the word "known"; *i.e.*, it has not been construed to mean "known to a certainty" or "known to the employer by virtue of the employee's specific verbal articulation thereof." *See, e.g., Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997

(D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. The employee need not mention the ADA or even the term 'accommodation.'"); *see also Bultemeyer v. Ft. Wayne Community Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist); *McGinnis v. Wonder Chemical Co.*, 1995 U.S. Dist. LEXIS 18909 (E.D. Pa. 1995) (E.D. Pa. 1995). Thus, the Tenth Circuit was unjustified in rejecting the claim below because of the employer's supposed lack of "such *actual* knowledge that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it." *EEOC v. A&F*, 731 F.3d at 1125 (emphasis in original). This is especially so given that Ms. Elauf *wore a headscarf to the interview* where she was provided a "description of the dress requirements" that did not even mention headscarves. *Id.* at 1113. Moreover, her interviewer "assumed that she was Muslim," and "figured that was the religious reason why she wore her head scarf." *Id.* That assumption, if it was to prompt adverse action by the potential employer, required inquiry and an effort to accommodate if the assumption proved accurate.[12]

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[12] In addition to not adding the "known" requirement to 42 U.S.C. 2000e(j)'s accommodation provision, Congress in 1991 also did not amend Title VII to exclude coverage of sexual orientation and gender identity discrimination, as it had a year earlier in passing the ADA. See 42 U.S.C. § 12211(a) ("For purposes of the definition of 'disability' , homosexuality and bisexuality are not impairments and as such are not disabilities under this Act."); 42 U.S.C. § 12111(b)(1) ("'disability' shall not

include transvestism, transsexualism "). And its failure to add the ADA exception for sexual orientation and gender identity coverage speaks volumes. The 1991 Act took dead aim at the *Price Waterhouse v. Hopkins*, 489 U.S. 228 (1989) decision – but only its mixed motive holding, not its holding that sex discrimination may inhere in an adverse employment action based on the employee's noncomformity with gender stereotypes, see *id.* at 250-51, a holding that obviously has significant implications for lesbians and gay men. Both courts favorable and hostile to Title VII claims by lesbians and gay men have recognized the obvious: "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices," *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006); see also *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) ("'[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.'") (citation omitted); *Kay v. Independence Blue Cross*, 142 F. App'x 48, 51 (3d Cir. 2005) ("The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics."); *Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 42, 44 n.3 (D. Mass 2007) ("Certainly, some discrimination directed towards homosexual employees is based on those employees' non-compliance with associational gender stereotypes."); *Birkholz v. City of New York*, 2012 U.S. Dist. LEXIS 22445 **21-23 (E.D.N.Y. Feb. 17, 2012) ("courts have candidly recognized the analytical difficulties' inherent in distinguishing between "stereotypical notions about how men and women should behave" and "ideas about heterosexuality and homosexuality.") (citation omitted); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."). Of course these issues are not presented and should not be resolved here, given that they have not been fully briefed in this case to the Court.

IV. While Employers' Burden Of Religious Accommodation Is Light And Manageable In Practice, It Requires Employers To Engage In An Exchange Of Information And To Consider Options, Which The Tenth Circuit's Newly Invented Rule Improperly Pretermits.

There can be no serious dispute that Congress has banned employment practices that accomplish discrimination "because of" religion by screening out job applicants and employees due to their actual or assumed religious practices when conflict is avoidable through minor adjustment of workplace rules. *See Ansonia*, 479 U.S. at 69. The employer's duty to accommodate is limited, however, and employee requests that impose more than *de minimus* burdens on the employer create "undue" hardship and may be denied. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). But, to assess the burden and discharge even this limited duty, the employer must acquire sufficient information about employee needs to ascertain feasible options. The case law applying the reasonable accommodation requirement shows how readily employers and employees engage in the bilateral cooperation through which Congress intended employers to determine whether they can fashion acceptable accommodations. The Tenth Circuit's approach in this case, by contrast, creates a contrary incentive; it rewards employers that reject applicants and dismiss employees based on religion—including based on unverified assumptions about religious needs—without revealing the religious basis for the rejection, rather than exploring whether a conflict actually exists and, if so,

how the employer could accomplish the "reconciliation of needs" for which Congress created the employer's duty to accommodate. *Id.* (citation omitted).

The required exploration usually requires an exchange of information, regardless of how that is accomplished. For example, in *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004), the exchange involved conversations and written directions to the employee, Peterson, who had posted Biblical passages condemning homosexuality in his work area in plain view of coworkers. Hewlett-Packard reprimanded him, explaining that others found the material hostile and demeaning and that display of such material in the workplace was contrary to the company's diversity policy. Peterson responded that he believed he had a religious duty to prompt a strong reaction from his coworkers to motivate them to reconsider their views. He was given multiple direct instructions to remove the postings, which he defied and then was terminated. His subsequent Title VII religious discrimination claim failed because Hewlett-Packard had engaged in good faith efforts to ascertain and accommodate his religious beliefs and then, in the end, could not do so without undue hardship. As the court explained, the statute does not require employers to "accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce." *Id.* at 607-08. Nor does it require employers "to accommodate an employee's desire to impose his religious beliefs upon his co-workers." *Id.* at 607.

As a general matter, Title VII's duty to accommodate does not prevent employers from forbidding mistreatment of others, even when the motive is religious, as long as they have obtained enough information to determine whether it is reasonably possible to avoid the conflict. In the words of the Fourth Circuit, "[W]here an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place." *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996). In that case, Tulon, the employer, had satisfied its duty once it had been informed that its employees had become distressed upon receiving the religiously motivated letters criticizing their private lives sent to their homes by their co-worker, Chalmers, and then heard from Chalmers her religious reasons for wanting to engage with her fellow employees in this manner. At that point, Tulon was not required to accommodate the religiously motivated practice because, as in *Peterson*, adverse effects on other employees were unavoidable. Likewise, when an employer has come to know that "active recruitment" is part of an employee's religious practice and has gathered information about the effects on other employees, the employer may "restrict workplace proselytizing" because employers need not permit an employee "to impose her beliefs upon her co-workers." *E.E.O.C. v. Serrano's Mexican Restaurants, LLC*, 2007 WL 1063179 *3 (D. Ariz. Apr 5, 2007).

Similarly, once having gathered sufficient information to understand their employees' religious needs and having considered accommodation options,

employers need not permit employees to refuse on religious grounds to perform basic job duties. *See, e.g., Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495, 497-98, 500 (5th Cir. 2001) (Title VII did not require accommodation of counselor-employee's request to be excused from counseling patients on subjects conflicting with her religious beliefs where employee's refusal to counsel patients about non-marital relationships meant "she would not perform some aspects of the position itself"); *accord Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352 (Ind. 1988) (under analogous state law, rejecting religious discrimination claim of lab technician fired for refusing to do tests on specimens labeled with HIV warning because he believed "AIDS is God's plague on man and performing the tests would go against God's will").

Workplace harassment of LGBT people is widespread and can pose particular challenges both for targets of such misconduct and for employers seeking cooperative workplace relationships.[13] When such harassment is religiously motivated, Title VII's duty to accommodate certainly applies but does not prevent employers from forbidding mistreatment of others as long as the employer engages in a good faith effort to understand the religious employee's needs and to ascertain whether an accommodation of interests is possible. *See, e.g., Peterson*, 358 F.3d at 607-08; *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir.

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[13] *See generally* Jennifer Pizer, et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A.L. Rev. 715 (2012).

2004) (rejecting religious discrimination claim of supervisor terminated for antigay religious harassment of lesbian subordinate contrary to religiously neutral employer policy); *Knight v. Conn. Dep't of Public Health*, 275 F.3d 156 (2d Cir. 2001) (rejecting failure to accommodate claim of visiting nurse who claimed a religious right to engage in antigay proselytizing to homebound AIDS patient); *Moore v. Metro. Human Serv. Dist.*, 2010 WL 3982312 (E.D. La. Oct. 8, 2010) (rejecting failure to accommodate claim of public-employee social worker who demanded right to engage in Christian counseling methods).

Comparing the approaches taken by two large technology companies illustrates the essential nature of the employer's duty to obtain sufficient information to determine whether and how it may be able to accommodate a religious employee's needs while still pursuing its business goals. The *Peterson* court explained that, "[i]n numerous meetings, Hewlett-Packard managers acknowledged the sincerity of Peterson's beliefs and insisted that he need not change them." 358 F.3d at 604. The managers explained that, instead, Peterson simply needed to refrain from specified conduct through which he admittedly intended to, and did, distress co-workers. By contrast, in *Buonanno v. AT&T Broadband, LLC*, the employer was not satisfied with the employee's stated commitment to abide by AT&T's diversity policy and required in addition that Buonanno "'value' particular behavior and beliefs of co-workers." 313 F. Supp. 2d 1069, 1082 (D. Colo. 2004). Although AT&T's managers did engage in communication with Buonanno, they failed to ascertain and respect his actual needs, where doing

so was necessary to discharge the company's duty to accommodate, The lesson for the present case is plain: when on notice about a likely conflict between company policy and an applicant's or employee's religious needs, an employer cannot satisfy its responsibility to try to accommodate those needs, per Congress' explicit command, without pursuing an open exchange of information reasonably calculated to learn what it needs to know about the apparently conflicting interests.

In sum, abundant cases show that the interaction required is straightforward with both parties expected to identify their respective needs using the information each possesses, and with the employer then required to try in good faith to resolve conflicts. When employee demands truly are incompatible with employer needs, employers need only have verified that reconciliation is impossible. Courts for decades have been applying this approach without difficulty and without judge-made limitations on the employer's duty. The Tenth Circuit erred in its invention of a rule contrary to this approach and inconsistent with the text of the statute.

CONCLUSION

Amicus respectfully requests that this Court reverse the Tenth Circuit's erroneous decision and again instruct the lower courts not to impose judicially-created disqualifications on the statutorily sufficient claims of Title VII plaintiffs.

Respectfully submitted,

GREGORY R. NEVINS
Counsel of Record
Lambda Legal Defense
and Education Fund, Inc.
730 Peachtree Street, NE
Suite 1070
Atlanta, GA 30308
(404) 897-1880
gnevins@lambdalegal.org

JENNIFER C. PIZER
Lambda Legal Defense
and Education Fund,
Inc.
4221 Wilshire Blvd.,
Suite 280
Los Angeles, CA 90010
(213) 382-7600

Attorneys for Amicus Curiae

December 10, 2014

No. 14-86

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street, NW
Suite 515
Washington, DC 20001

CHARLES W. THOMPSON, JR.
Counsel of Record
Executive Director,
General Counsel
AMANDA KELLER
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
7910 Woodmont Avenue
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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42 U.S.C. § 12112(d)(4) (1994) 20

804 MASS REGS. CODE 03.01(9) (2014), *available at* http://www.mass.gov/mcad/regs804cmr0300.html 19

WASH. ADMIN. CODE § 162-12-140 (2014) 18

OTHER AUTHORITIES

ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/medfin5.pdf (last visited Jan. 19, 2015) 21

Best Practices for Eradicating Religious Discrimination in the Workplace, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited Jan. 9, 2015) . 16

Discrimination in Pre-Employment Inquiries, MISSOURI DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS, http://labor.mo.gov/mohumanrights/Discrimination/pre_employ_inquiries (last visited Jan. 22, 2015) 19

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TABLE OF AUTHORITIES—Continued

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Religious Discrimination*, EEOC COMPLIANCE MANUAL, No. 915.003 (July 22, 2008), http://www.eeoc.gov/policy/docs/religion.html#_ftn135 ..... 12, 13

Guidelines on Equal Employment Practices: Preventing Discrimination in Hiring, KANSAS HUMAN RIGHTS COMMISSION, http://www.khrc.net/hiring.html (last visited Jan. 22, 2015) 19

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Prohibited Employment Policies/Practices, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/ (last visited Jan. 8, 2015) 16

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Religious Garb and Grooming in the Workplace: Rights and Responsibilities, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/ publications/qa_religious_garb_grooming.cfm#_ftnref10 (last visited Jan. 16, 2015) 11, 28

UTAH LABOR COMMISSION, UTAH LABOR COMMISSION ANTIDISCRIMINATION AND LABOR DIVISION (2010), http://laborcommission.utah.gov/media/pdfs/uald/pubs/STATELAWPACKET.pdf 19

STATEMENT OF INTEREST[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at

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[1] Pursuant to Supreme Court Rule 37.6 *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amici curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, the Respondents and the Petitioners received at least 10-days' notice of the intent to file this brief under the Rule, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the Unites States Courts of Appeals, and in state supreme and appellate courts.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National Public Employer Labor Relations Association (NPELRA) is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

Amici curiae support laws, policies, and practices that eliminate discrimination in the workplace and which require employers to make reasonable accommodations so that people can participate equally in all aspects of their community regardless of their religious beliefs or any other protected characteristics. And *amici* believe that communities cannot achieve true equality so long as stereotyping people in ways related to race, gender, national origin, religion, disability, age, sexual orientation, or any other protected characteristic continues. For these reasons, *amici* support the EEOC's long-standing policy of opposing the use of assumptions and stereotyping in an employment interview and hiring decision.

However, because the EEOC has now done an about-face on that long-standing policy, *amici* have a strong interest in apprising this Court of the significant adverse consequences facing the Nation's state and local governments if the Tenth Circuit's decision is reversed. As *amici* argue below, the EEOC's proposed change to the analytical framework of religious accommodation cases under Title VII, if adopted by this Court, interjects stereotyping into the hiring process and will have far-reaching consequences for state and local governments. Under the EEOC's rule, if employers ask about an applicant's religion they can avoid liability under Title VII's religious accommodation theory but may subject themselves to liability under Title VII's disparate treatment theory if they don't offer the applicant a job. Employers will therefore be left in a Catch-22 situation, facing potential liability regardless of the course of action they take.

For state and local governments, the issue is particularly problematic given the wide range of

government jobs that have policies that implicate potential religious accommodation issues. It is not difficult to foresee the litany of instances testing whether state and local governments must inquire into a prospective employee's religion if the EEOC's argument is adopted by this Court.

SUMMARY OF ARGUMENT

Under Title VII, a disparate treatment claim and a claim that an employer failed to accommodate an individual's religion are treated as separate and distinct avenues of liability. The EEOC could have brought a disparate treatment claim in this case but it chose not to. Perhaps sensing that it made a tactical mistake, the EEOC's argument now attempts to piggyback a disparate treatment claim onto its failure to accommodate claim, which is akin to attempting to fit a square peg into a round hole. In conflating the two types of liability, the EEOC would further muddy the Title VII waters and create liability not contemplated by that statute.[2]

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[2] By changing its argument, the EEOC obfuscates the decision of the Tenth Circuit to suggest an issue quite different from the one before the Tenth Circuit and an issue couched in terms so absolute that only one result ought to follow. The issue the EEOC set forth in its petition was:

> Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee. Pet'r's Cert. Pet. I.

Although the EEOC tries to re-frame this case as a disparate treatment case, the reality is that this case was prosecuted and decided below as a religious accommodation case. Consistent with the Tenth Circuit's decision, the majority of courts have held that an employer is not liable for failing to provide an employee with a religious accommodation where that employer has no actual notice of the need for an accommodation. Indeed, until it brought this case, the EEOC's guidance had plainly stated as much. Now, however, the EEOC seeks to require an employer to make assumptions about which candidates may need a religious accommodation even when the employer does not have any *actual knowledge* of the individual's religion or need for an accommodation. The EEOC urges this result, despite the fact that Title VII and various state and local anti-discrimination statutes prohibit employers from relying on such assumptions.

Further under the EEOC's proposed rule, employers will be squeezed between a disparate treatment claim and a failure to accommodate claim, facing potential liability regardless of the course of action they take. If the EEOC has its way, disparate treatment claims will surely increase because inquiries into protected status during the pre-employment stage can be used as evidence of discrimination. As a result, government

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Were the issue so simple, *amici* may have joined those in support of Petitioner, but that is not the case. Instead, the Tenth Circuit concluded that an employer who makes a decision not to hire a person, cannot be held liable for failing to offer that person a religious accommodation that has not been requested simply because the interviewer made an assumption about the applicant's religion. Rather than support the EEOC in this case, the *amici* support the EEOC's guidance and long held policy requiring prospective employers to avoid making and acting upon assumptions about an applicant's protected characteristics.

employers, who are already cash and resource strapped, will face an increase in lawsuits that could have been prevented by adhering to the current rule followed by the majority of circuit courts that requires actual notice of the need for a religious accommodation.

If employers are forced to make assumptions about an individual's religion based on religious stereotypes, where should employers draw the line? A woman wearing a head scarf might do so for fashion,[3] cultural, or religious reasons. Yet the EEOC wants an employer and this Court to assume the applicant required a religious accommodation due to her head covering and Abercrombie's conflicting policy (despite the EEOC's own expert's testimony indicating that such a head covering may be worn for either cultural *or* religious reasons). There are other examples that are just as problematic but far less obvious. Following the EEOC's logic, an employer may have to inquire into a prospective employee's religion based on everything from tattoos and jewelry to facial hair and dreadlocks.

State and local governments are collectively the Nation's largest employer and there are a myriad of situations where the question of the need for a religious accommodation is implicated–from staffing needs under a twenty four hour a day, seven day a week requirement to dress code requirements

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[3] A google search of head scarves coupled with "fashion" leads to a number of results; some include head scarves worn for religious reasons and others for fashion as in the following example. Natasha Krezic, *Style Guide: How to wear head scarves?*, FABFASHIONFIX (Apr. 22, 2013), http://fabfashionfix.com/style-guide-how-to-wear-head-scarves/. To assume that a woman wearing a head covering does so for religious reasons ought to be seen for what it is—religious stereotyping.

involving everything from uniforms to grooming policies.

For public employers, First Amendment issues also intersect with individual rights under Title VII. Public employers have a unique interest in remaining secular as even the appearance of religious coercion or behavior that could be deemed to be endorsing a particular religion can create tension in their communities and potential liability. In some cases, public employers have implemented policies which have the effect of prohibiting employees in certain professions from wearing any overt religious garb or symbols, and courts have upheld those policies. *See Webb v. City of Philadelphia*, 562 F.3d 256, 258 (3d Cir. 2009); *Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001). Public employers utilize these policies in order to stave off Establishment Clause claims and in order to foster the public's trust in the government's ability to remain impartial.[4] Given public employers' strong interest in remaining secular and religion neutral, requiring a public employer to inquire into an applicant's religion based on stereotypes about that religion violates principled behavior.

Amici therefore respectfully request that this Court uphold the Tenth Circuit's decision and hold that an employer may not be liable for a religious accommodation claim under Title VII unless the

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[4] The recent tragedy in Ferguson, Missouri and its aftermath confirms a government's desire to serve the residents it represents both actually and perceptually. Where a community believes that its law enforcement unjustly target individuals based on protected characteristics, the community loses faith in its government. Hiring a diverse workforce that does not seemingly show partiality to segments of the community helps maintain a community's faith in its government.

employer has actual knowledge of the need for a religious accommodation. The rule we urge this Court to adopt resembles the bright line rule in cases brought under the Americans with Disabilities Act. At the interview stage an employer should not make assumptions and inquire into a person's religion. Upon being asked either at the interview or upon hiring about necessary accommodations, the employer must offer reasonable accommodations that do not pose an undue hardship on its business operations. By so holding, this Court will provide a workable standard for employers and employees alike that is consistent with current employer best practices and avoids needless stereotyping in the workplace.

I. AN EMPLOYER SHOULD NOT BE LIABLE UNDER TITLE VII FOR FAILING TO ACCOMMODATE AN EMPLOYEE OR PROSPECTIVE EMPLOYEE'S RELIGION UNLESS THE EMPLOYER HAS ACTUAL KNOWLEDGE OF THE NEED FOR THE ACCOMMODATION

Under Title VII, it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin " 42 U.S.C. § 2000e-2(a) The term "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Thus, an employer's failure to reasonably accommodate an

employee's religious practice is a separate and distinct claim from a disparate treatment claim. *See, e.g.*, *Morales v. McKesson Health Solutions, LLC*, 136 Fed. Appx. 115, 118 (10th Cir. 2005) (providing that "a religious accommodation claim is distinct from a 'straightforward disparate treatment' claim"); *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 562 (7th Cir. 2003) (noting reasonable accommodation theory is "a theory of liability separate from intentional discrimination"); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1017 (4th Cir. 1996) (accord).

In order to make out a prima facie case of discrimination based on an employer's failure to provide a religious accommodation, the employee/applicant must show that she "held a bona fide religious belief conflicting with an employment requirement; (2) *informed her employer of her belief*; and (3) faced an adverse employment action [i.e., was not hired] due to her failure to comply with the conflicting employment requirement." *See Francis v. Perez*, 970 F. Supp. 2d 48, 60 (D.D.C. 2013) (internal quotations omitted) (emphasis added); *see also EEOC v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De P.R.*, 279 F.3d 49, 55 (1st Cir. 2002), *citing EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996); *Knight v. State Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001). Despite the EEOC's arguments to the contrary, the overwhelming authority from the courts of appeals requires actual notice of the employee's religion in order to establish a prima facie case of a failure to accommodate claim. *See* Resp't's Resp. to Pet. 14-16 (detailing case law from each Circuit Court of Appeals requiring actual notice of an employee's religion in order to find liability under Title VII for failure to accommodate).

Furthermore, the EEOC's contention that it did not change its guidance regarding the notice requirement is contradicted by the facts.[5] Until this case was pending, the EEOC's guidance had been consistent and clear.[6] In its guidance and in numerous other places, the EEOC repeatedly stated that an employee must provide *actual notice* to his or her employer

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[5] As outlined below, until it brought this case, the EEOC's guidance consistently indicated that the employee must provide the employer with notice regarding the need for a religious accommodation. However, after this case was pending, the EEOC changed its guidance on dress and grooming practices, and now states: "In some instances, even absent a request, it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed." *See Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm#_ftnref10 (last visited Jan. 16, 2015). In its new guidance, the EEOC even uses a self-serving example of an "obvious" situation that is modeled on the facts of this case. *See id.*, Example 7.

[6] The EEOC reframed its guidance as this case proceeded through the courts using a factual scenario markedly similar to the facts in this case, without providing any notice and comment period prior to making the change. Doing so violates the rule set forth in *Paralyzed Veterans of America v. D.C. Arena Limited Partnership*, which provides that the Administrative Procedure Act requires that regulators provide a notice and comment period whenever an agency amends existing "definitive" interpretive rules / guidance. 117 F.3d 579, 586 (D.C. Cir. 1997). Doing so also suggests EEOC's recognition that its previous guidance to employers differed vastly from what it would like this Court to adopt. By changing its guidance, the EEOC has also created conflicts with state and local laws, which have their own parallel anti-discrimination statutes, without affording state and local governments the opportunity to weigh in on the EEOC's change.

regarding the need for a religious accommodation. Specifically, the EEOC stated the following:

- Employers must provide "reasonable accommodation of employees' sincerely held religious beliefs, observances, and practices *when requested* " EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Religious Discrimination, in* EEOC COMPLIANCE MANUAL, No. 915.003 §12 (July 22, 2008), http://www.eeoc.gov/policy/docs/religion.html#_ftn135 ("EEOC Compliance Manual") (emphasis added);
- "In addition *to placing the employer on notice* of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted." *Id.* (emphasis added);
- Investigators must "[a]scertain whether [the charging party] *actually notified* [respondent] of the need for a religious accommodation . . . ." *Id.* (emphasis added);
- "Notice of the Conflict Between Religion and Work: An applicant or employee who seeks religious accommodation *must make the employer aware* both of the need for accommodation and that it is being requested due to a conflict between religion and work. *The employee is obligated to explain* the religious nature of the belief or practice at issue, *and cannot assume that the employer will already know or understand it.*" *Id.* (emphasis added); and
- "When an employee or applicant needs a dress or grooming accommodation for religious reasons, *he should notify the employer* that

> he needs such an accommodation for religious reasons." *Religious Discrimination*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/religion.cfm (last visited Jan. 9, 2015) (emphasis added).

Despite the preponderance of case law and its own guidance to the contrary, the EEOC argues that instead of relying on actual notice of an employee's religion, an employer can be held liable under Title VII for failing to accommodate an employee's religion if the employer correctly "assumes," "infers," or "understands" that the employee or applicant has a particular religious observance.[7] *See* Pet'r's Br. 11, 15, 19. The case law that the EEOC relies on does not support its argument. Indeed, many of the cases the EEOC cites find liability for the employer because the employer had *actual knowledge* of an employee's need for an accommodation without direct notice from the employee, which is radically different from an employer making assumptions about an employee's religion. *See e.g.*, *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 447 (7th Cir. 2013) (finding notice was adequate where employee requested time off for his father's funeral, which he explained involved "compulsory" burial rites and that he and his family would "suffer at least spiritual death" if he did not attend); *Brown v. Polk County*, 61 F.3d 650, 652 (8th

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[7] In its brief, the EEOC uses deposition testimony that the hiring manager "assumed" the applicant was Muslim to argue for a rule that an employer can be liable under Title VII based on its "correct understanding" or "correct inference" of that person's religion. Regardless of these linguistic gymnastics, the EEOC is proposing to hold employers liable for failing to provide unsolicited religious accommodations based on assumptions and stereotypes regarding an applicant's religion.

Cir. 1995) (finding employer had notice of employee's religion based on his affirmation of his Christianity throughout his employment and the fact that he referred to Bible passages); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (noting that employer "knew" plaintiff was Jewish and that his wife was studying for her conversion); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1360 (S.D. Fla. 1999) (finding employer had "actual knowledge" of the applicant's religious beliefs from the applicant's reference).

Further, the EEOC's suggestion that a rule requiring actual notice would erode the purpose of Title VII is unfounded. The applicant in this case was not necessarily without redress. She could have pled either a disparate treatment or disparate impact claim against the Respondent; however, the EEOC chose to only pursue a failure to accommodate claim on her behalf. If it is true in this case that the Respondent did not hire the applicant because the hiring manager believed she was Muslim, a jury could have concluded that the Respondent was liable for intentional discrimination under a disparate treatment theory of liability. Similarly, the EEOC could have challenged the Respondent's Look Policy by claiming it had a disparate impact on certain religions. The religious accommodation framework should not be changed because the EEOC made a tactical mistake in litigating a case.

II. IF THE TENTH CIRCUIT'S DECISION IS REVERSED, EMPLOYERS WILL BE FORCED TO RELY ON STEREOTYPES IN ORDER TO ASCERTAIN AN EMPLOYEE'S OR PROSPECTIVE EMPLOYEE'S RELIGION

A. THE PURPOSE OF TITLE VII IS TO AVOID STEREOTYPING INDIVIDUALS BASED ON TRAITS ASSOCIATED WITH PROTECTED CLASSES

It is well-settled that Title VII seeks to prevent employers from categorizing employees based on stereotypes and assumptions about protected classes. As this Court has stated:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (U.S. 1989) (internal quotation marks and citations omitted). This Court has explained that it is clear under Title VII both from the statutory language and its underlying policy that the employer's focus should be on the individual, not on generalizations and assumptions about protected characteristics. *City of Los Angeles Department of Water v. Manhart*, 435 U.S. 702, 708-09 (1978); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 606 (1993) (concluding that Congress enacted the parallel Age Discrimination in Employment Act based on its "concern that older

workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes"); *Butt v. Board of Trustees*, 83 F. Supp. 2d 962, 972 (C.D. Ill. 1999) (noting that "Title VII protects employees from employment decisions that are predicated on stereotyped impressions involving protected characteristics").[8]

The EEOC's Guidance is similarly unequivocal that employers should not rely on stereotypes when making employment decisions. "An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information." *See Prohibited Employment Policies / Practices*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/ (last visited Jan. 8, 2015); *see also Best Practices for Eradicating Religious Discrimination in the Workplace*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited Jan. 9, 2015) (noting that in order to "avoid allegations of intentional discrimination, employers have been cautioned by the EEOC to avoid assumptions or stereotypes about what constitutes a religious belief or practice").

Despite its well reasoned and principled guidance upon which a disparate treatment case against the

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[8] In *Butt v. Board of Trustees*, the court noted that an employer "cannot rely on national origin or race or religion as a proxy for an employee's personal characteristics," explaining that, for example, an employer that bases an employment decision on the employer's belief that Pakistani males have a "patronizing attitude toward women" would violate Title VII. 83 F. Supp. 2d at 972.

Respondent might have been brought, the EEOC wants to change the requirement that a prospective employee must first request an accommodation before an employer is held to have denied an accommodation. The EEOC wants employers to make assumptions about religious practices and to use those assumptions to inquire into a prospective employee's protected status.

Further, while this case is linked to assumptions based on religion, assumptions based on gender, race, color, national origin, and disability fall into the same trap. An employer may be tempted to make assumptions based upon a person's appearance. However, case law, the EEOC, and state and local governments have demanded those assumptions be suppressed in the hiring process to prevent discrimination. Now, however, the EEOC wants to require an employer to use assumptions to inquire into a person's religion. Tomorrow, will it demand that employers use assumptions to inquire into a person's gender, national origin, race, color, or disability? The EEOC may urge this deviation from its own standards, but *amici* urge this Court to provide a more just result. The rule requiring an employer to have actual notice of the need for an accommodation must be preserved.

B. IF THE EEOC'S RULE IS ADOPTED EMPLOYERS WILL BE FORCED TO INQUIRE INTO EMPLOYEES' AND PROSPECTIVE EMPLOYEES' RELIGIONS BASED ON STEREOTYPES, WHICH WILL LEAD TO AN INCREASE IN DISCRIMINATION SUITS AGAINST EMPLOYERS

If the Court reverses the Tenth Circuit's decision, thereby requiring employers to inquire into prospective employees' religions, employers will be placed in a Catch-22 situation. Employers may either be sued under the failure to accommodate theory of liability for failing to ask about an employee or prospective employee's need for a religious accommodation. Or, employers may face potential liability under Title VII's disparate treatment theory for making pre-employment inquiries about an employee or prospective employee's religion based on assumptions and stereotypes. A disparate treatment claim is likely viable in the latter instance because in its guidance on pre-employment inquiries, the EEOC provides: "Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, *such inquiries may be used as evidence of an employer's intent to discriminate* unless the questions asked can be justified by some business purpose."[9] *See*

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[9] A number of states also indicate, through laws, regulations, and guidance, that pre-employment inquiries into religion and other protected characteristics are unacceptable and in some instances expressly prohibited. *See, e.g.*, WASH. ADMIN. CODE § 162-12-140 (2014) (providing that "[a]ll preemployment

Prohibited Employment Policies/Practices, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/#pre-employment_inquiries (last visited Jan. 9, 2015) (emphasis added); *see also Pre-Employment Inquiries and Religious Affiliation or Beliefs*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Jan. 9, 2015) (noting that "[q]uestions about an applicant's religious

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inquiries that unnecessarily elicit the protected status of a job applicant are prohibited . . ." and noting that there are no "fair preemployment inquiries" into religion); 804 MASS REGS. CODE 03.01(9) (2014), *available at* http://www.mass.gov/mcad/regs804cmr0300.html (providing that "[a]s a general rule, an employer may not make inquiries, the response to which would likely disclose the applicant's protected status" and noting that there are no questions that an employer may ask regarding religion at the pre-employment stage); *Discrimination in Pre-Employment Inquiries*, MISSOURI DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS, http://labor.mo.gov/mohumanrights/Discrimination/pre_employ_inquiries (last visited Jan. 22, 2015) (noting that "[i]nappropriate pre-employment inquiries may be used as evidence of employment discrimination" and "[e]mployers may not inquire directly about an applicant's religious beliefs or practices"); *Pre-Employment Inquiries – Discrimination Pitfalls*, IDAHO COMMISSION ON HUMAN RIGHTS, http://human rights.idaho.gov/discrimination/pre_employment.html (last visited Jan. 22, 2015) (providing that employers should not "ask applicants to state their race, sex, age, color, national origin, religious preference, or medical problems"); *Guidelines on Equal Employment Practices: Preventing Discrimination in Hiring*, KANSAS HUMAN RIGHTS COMMISSION, http://www.khrc.net/hiring.html (last visited Jan. 22, 2015) (stating that "[a]ny inquiry that might indicate the applicant's religious practices or customs" is an "inadvisable inquiry"); UTAH LABOR COMMISSION, UTAH LABOR COMMISSION ANTIDISCRIMINATION AND LABOR DIVISION (2010), http://laborcommission.utah.gov/media/pdfs/ualdl/pubs/STATELAWPACKET.pdf (indicating that there are no proper pre-employment inquiries regarding an applicant's religion).

affiliation or beliefs (unless the religion is a bona fide occupational qualification (BFOQ)), are generally viewed as non-job related and problematic under federal law").

There is no way to reconcile this Court's admonishment against stereotyping and the EEOC's consistent guidance providing that employers should refrain from asking about prospective employees' religion with the EEOC's argument in this case. Anytime an employer assumes someone might adhere to a certain religion, based on their appearance, dress, or other physical characteristics (including potentially their race or color), the EEOC would now have that employer put an awkward and deeply personal question to the applicant about his or her religion or else face liability despite the fact that the applicant could use such questioning as evidence of pretext in an intentional discrimination suit.

Instead of placing employers in an untenable situation, the ADA's general rule prohibiting employers from inquiring into an applicant's disability at the pre-offer stage provides a better model for this Court to follow regarding religious accommodation inquiries.[10] Although the ADA contains no qualifying

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[10] Under the ADA, disability related inquiries are reviewed differently depending on whether the person is an applicant or an employee. *See* 42 U.S.C. §12112(d)(1994). Employers are prohibited from making inquiries regarding an applicant's disability at the pre-offer stage and *amici* urge this Court to adopt a similar rule for religious accommodation inquiries. 42 U.S.C. §12112(d)(2)(A)(1994). Regarding employees, although the ADA allows inquiries into an employee's medical condition under limited circumstances, the EEOC's guidance is clear that it must be made on "objective evidence" and "[s]uch a belief requires an assessment of the employee and his/her position and *cannot be based on general assumptions.*" 42 U.S.C. §12112(d)(4)(1994); 42

language, the EEOC's guidance indicates that an employer may make pre-offer disability inquiries where the disability is "obvious." *See ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/medfin5.pdf (last visited Jan. 19, 2015). Even if such a reading is correct, unlike under the ADA where an applicant's disability may be "obvious," where for example, the applicant uses a wheelchair, for religious accommodation cases, a bright line rule prohibiting inquiries into an applicant's religion at the pre-employment stage is a far more workable standard. After all, there are almost no similarly "obvious" religious attributes. Even in this case where the EEOC believes that the head covering worn by the applicant made it obvious that she was Muslim, the EEOC's own expert testified that head coverings can be worn by some women for cultural reasons too. And, as discussed earlier, some women may wear them as a fashion statement.

Further, subjecting an employer to a possible intentional discrimination lawsuit by forcing the employer to ask a candidate about the need for a religious accommodation is especially unfair if the employer realizes during the interview that the applicant is not qualified for the job. Imagine Ms.

U.S.C. §12112(d)(1994); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA), No. 915.002 (July 27, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_12_ (emphasis added). A rule prohibiting employers from relying on stereotypes and assumptions is particularly important in the religious accommodation context because indicia of religion do not lend themselves well to an objective test.

Elauf had a sister who applied at Abercrombie also wearing a headscarf. Imagine it was obvious to the interviewer that the sister was not attractive enough to be an Abercrombie "model." Few would feel sorry for Abercrombie if the sister sued Abercrombie for intentional discrimination after the interviewer asked her about her need for a religious accommodation but then did not hire her based on her lack of attractiveness. However, for the majority of employers who may find out during an interview that candidates lack essential qualifications, the issue of an accommodation should not be interjected into and allowed to compromise the interview process. Instead, it ought to arise only once a decision to hire has been made just as employers do for ADA related accommodations.

III. STATE AND LOCAL GOVERNMENT EMPLOYERS WILL BE SIGNIFICANTLY IMPACTED BY ANY CHANGE TO THE TITLE VII RELIGIOUS ACCOMMODATION FRAMEWORK

A. THE EEOC'S CHANGE TO THE RELIGIOUS ACCOMMODATION FRAMEWORK CONFOUNDS HIRING PRACTICES FOR PUBLIC EMPLOYERS

As discussed above, if the EEOC's argument is adopted, employers will be forced to rely on religious stereotypes and inquire into applicants' religious practices, despite the fact that Title VII seeks to prevent this type of behavior. Because state and local governments are collectively the Nation's largest employer, have the greatest variety of staffing requirements, grooming and dress policies, and must rigorously operate within the confines of the First

Amendment, the sheer volume of situations involving issues of religious accommodation affects them more than any other employer. State and local governments have a multitude of policies that implicate potential religious accommodation issues. Government operations include services that must be provided on a twenty four hour a day, seven day a week basis and which must balance accommodation needs with public service requirements. Similarly, state and local governments adopt dress code policies for many jobs based on specific operational requirements that can prohibit facial hair, head coverings, tattoos, long hair, and other expressions of non-conformity. Still other public employment jobs have policies that effectively prohibit employees from displaying any visible religious symbols.

It is not difficult to imagine the slippery slope that the EEOC has proposed. Public employers will have a difficult time ascertaining when it is appropriate to make an inquiry into someone's religion given the complexities and diversity of modern religions coupled with the sheer volume of public jobs that have dress codes, uniform requirements, prohibit facial hair or long hair, or prohibit visible tattoos. For example, many police departments prohibit facial hair and some require personnel to wear their hair short, both for safety and uniformity purposes. If a person with dreadlocks applies for a position within the police force, under the EEOC's proposed rule, it is unclear whether the government employer would be required to ask if the hairstyle is a religious requirement or a grooming choice. Contrary to the EEOC's arguments, there would be nothing problematic about the employer in this scenario choosing to hire or not hire this individual solely based on his merit without taking his dreadlocks into account. If he was not

already aware of the police department's short hair policy and he did not raise the need for an accommodation. The interview, once he was hired and became aware of the policy he could request an accommodation. The police department could determine whether providing it would be an undue hardship.

It is not difficult to imagine other problems that would stem from the EEOC's proposed rule in this case, including situations where an employer would have to rely on stereotypes about the applicant's race or national origin in order to guess the person's religion. For instance, many fire departments use Self Contained Breathing Apparatuses and therefore prohibit facial hair because it prevents a proper seal for the breathing device. Under the EEOC's proposed rule, it is unclear whether a public employer would have to ask every male applicant with a beard about his religion and if he required an accommodation. Alternatively, and more problematically, would the rule only require a public employer to ask an applicant with a beard about his religion if the interviewer made assumptions about his religion based on other characteristics such as the person's race? Thus, an employer could face an intentional discrimination suit for asking a male applicant who the employer believes is Muslim based on his facial hair and skin color whether he needs an accommodation for his religion but does not ask fairer skinned male applicants with beards if they need an accommodation.

Similarly, some religions encourage adherents to get tattoos. If an employer interviews someone with a visible tattoo and the employer, like many public employers, has a policy prohibiting visible tattoos, is the employer required to ask if the person needs a

religious accommodation? Again, in deciding whether to ask, should the employer rely on the person's race or national origin to guess whether the tattoos are based on the person's religion?

As the foregoing demonstrates, if the Court reverses the Tenth Circuit's decision and requires public employers to inquire into a prospective employee's religious practices based on stereotypes, there is no clear point at which those inquiries will stop. Instead of suppressing their perceptions regarding race, religion, and national origin, employers will need to guess whether their now unsuppressed stereotypes about an applicant rise to a level that requires an inquiry into the applicant's religion. More problematic will be the ensuing litigation that pries into an employer's subconscious to discern whether the employer allowed certain physical characteristics or the person's dress or appearance to influence its assumption concerning the likelihood that the applicant practices a certain religion that might conflict with one of the employer's policies. The result will almost certainly lead to increased discrimination, undercutting the very purpose of Title VII. The current rule, requiring an employee to provide actual notice to his or her employer or prospective employer before any liability for a failure to accommodate claim can attach is far more practical and keeps with the purpose and intent of Title VII.

B. PUBLIC EMPLOYERS MUST CONSIDER THE ESTABLISHMENT CLAUSE IF THE REQUIREMENTS FOR RELIGIOUS ACCOMMODATION CASES ARE CHANGED

The EEOC's proposed rule shifting the burden onto employers to inquire into a prospective employee's

religion based on assumptions and stereotypes would apply with equal force to both public and private employers. Whenever issues of religion in the workplace arise, however, public employers must take into account additional considerations beyond those of a private employer. Specifically, government employers must consider constraints under the Establishment Clause of the First Amendment, which has been interpreted to mean that a government may not: "(1) promote or affiliate itself with any religious doctrine or organization, (2) discriminate among persons on the basis of their religious beliefs and practices, (3) delegate a governmental power to a religious institution, or (4) involve itself too deeply in such an institution's affairs." *County of Allegheny v. ACLU*, 492 U.S. 573, 578 (1989). At a minimum, what this means for a government employer is that it may not endorse religion. *See Larson v. Valente*, 456 U. S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). As Justice Kagan noted in her dissent in the *Town of Greece v. Galloway*:

> W]hen a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials participate in the business of

> government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose.
>
> 133 S. Ct. 2388 (2013) (Kagan, J., dissenting) (citation omitted).

As a result of First Amendment concerns, governments as employers have a strong interest in remaining secular and religion neutral. Many of their policies reflect those concerns and some policies go so far as to effectively prohibit certain categories of employees from wearing any overt religious symbols or garb. For example, in *Webb v. City of Philadelphia*, the city's police department denied a Muslim woman's request to wear a head covering based on the city's strict dress code policy, which essentially prohibited police officers from wearing anything other than the department issued uniform. 562 F.3d 256, 258 (3d Cir. 2009). In upholding the city's decision, the Third Circuit credited the police commissioner's testimony that:

> [what is] at stake is the police department's impartiality, or more precisely, the perception of its impartiality by citizens of all races and religions whom the police are charged to serve and protect. If not for the strict enforcement of Directive 78, the City contends, the essential values of impartiality, religious neutrality, uniformity, and the subordination of personal preference would be severely damaged to the detriment of the proper functioning of the police department. In the words of Police Commissioner Sylvester Johnson, uniformity "encourages the subordination of personal preferences in favor of the overall policing mission" and conveys "a sense of authority and competence to other officers

> inside the Department, as well as to the general public."

Id.; *see also Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001) (upholding police chief's denial of police officer's request to wear a pin of a cross on his uniform, concluding: "the city through its police chief has the right to promote a disciplined, identifiable, and impartial police force by maintaining its police uniform as a symbol of neutral government authority, free from expressions of personal bent or bias. The city's interest in conveying neutral authority through that uniform far outweighs an officer's interest in wearing any non-department-related symbol on it.").[11]

The foregoing helps illustrate that public employers often go to great lengths to prevent any appearance that the government is endorsing a particular religion (and courts have upheld those policy decisions). As the court explained in *Webb*, what is at stake for public employers is their appearance of religious neutrality and impartiality. Indeed, as Justice Kagan noted, "religious favoritism [is] anathema to the First Amendment" and public employers must therefore proceed with caution whenever issues of religion arise in the workplace. *See Town of Greece*, 133 S. Ct. 2388 (2013) (Kagan, J., dissenting).

Public employers consider the Establishment Clause in every aspect of governance, from their

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[11] The EEOC similarly notes that "there may be limited situations in which the need for uniformity of appearance [for government employers] is so important that modifying the dress or grooming code would pose an undue hardship." *See Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm#_ftnref10 (last visited Jan. 16, 2015).

interactions with the public to their role as an employer. Because the EEOC's proposed rule in this case would apply with equal force to both public and private employers, any rule adopted by this Court regarding the notice provision for religious accommodation cases should take into account the limitations public employers face as a result of the Establishment Clause. If forced to rely on stereotypes about someone's religion during the interview process, the public's trust in a public employer's impartiality and ability to remain religious neutral will be eroded. Accordingly, any change to the notice requirement for religious accommodation cases under Title VII should take into account the fact that public employers must weigh Establishment Clause considerations whenever dealing with religion in the workplace. Requiring a public employer to inquire into a potential employee's religion is inconsistent with government employers' strong interest in remaining religion neutral.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court uphold the Tenth Circuit's decision requiring an employee to provide notice to his or her employer regarding the need for a religious accommodation.

Respectfully submitted,

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street, NW
Suite 515
Washington, DC 20001

CHARLES W. THOMPSON, JR.
Counsel of Record
Executive Director,
General Counsel
AMANDA KELLER
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
7910 Woodmont Avenue
Suite 1440
Bethesda, MD 20814
(202) 466-5424
cthompson@imla.org

Counsel for Amici Curiae

January 28, 2015

No. 14-86

In The Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), AGUDAS HARABBANIM, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONER

Of Counsel
DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS
450 Seventh Avenue
Suite 1101
New York, NY 10123

NATHAN LEWIN
Counsel of Record
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
888 17th St. NW, 4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Attorneys for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The petitioner Equal Employment Opportunity Commission ("EEOC") has presented a Question that, in the view of these *amici*, states the legal issue raised by the Tenth Circuit's majority opinion too narrowly. The necessary effect of the Tenth Circuit's majority opinion is to require applicants for employment who have a religious observance or practice that would require accommodation pursuant to 42 U.S.C. § 2000e(j) to inform potential employers of that religious observance or practice during the hiring process. These *amici* submit that such compelled disclosure ***in advance*** of the employment decision invites the employer to reject an applicant who would be entitled to a religious accommodation because the applicant's religious observance creates some additional inconvenience to the employer. The applicant who is rejected for this reason does not know and cannot readily prove that the applicant's religious observance was an important, if not primary, reason for rejection.

The Tenth Circuit's construction of the statute is, therefore, contrary to Congress' objective in enacting Section 2000e(j). The history of the statute establishes that Congress intended to protect applicants who have religious convictions that might affect their presence, appearance, or other conditions of employment against discriminatory hiring decisions.

Amici submit that the Question Presented on review of the Tenth Circuit's decision is the following:

Whether an applicant for employment is barred from invoking the "reasonable accommodation" provision of 42 U.S.C. § 2000e(j) if he or she fails explicitly to disclose to the potential employer before the employer makes a hiring decision that, if hired, the applicant may request an accommodation to his or her religious observance or practice.

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v.

ABERCROMBIE & FITCH STORES, INC.,
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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), ET AL., IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of

[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in this Court in 29 cases since 1968, usually on behalf of major Orthodox Jewish organizations. It has also supported laws protecting the right of observant Jews -- and that of their non-Jewish co-religionists -- to the reasonable accommodation of their religious observances when they conflict with governmental regulation or with societal practices.

Agudas Harabbanim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel intervenes at all levels of government -- federal, state, and local; legislative, administrative, and judicial -- to advocate and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general. Agudath Israel played a very active role in lobbying for the passage of the Religious Freedom and Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

National Council of Young Israel ("NCYI") is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

The Rabbinical Council of America, with national headquarters in New York City, is a professional organization serving more than 1,000 Orthodox Rabbis in the United States of America, Canada, Israel, and around the world. Membership is comprised of duly ordained Orthodox Rabbis who serve in positions of the congregational rabbinate, Jewish education, chaplaincies, and other allied fields of Jewish communal work.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. Because of our community's stake in the most expansive protection of this "first freedom," the

Orthodox Union was an active member of the coalition that advocated for the enactment of RFRA.

SUMMARY OF ARGUMENT

1. Section 2000e(j) was enacted to prevent the rejection of Sabbath-observers who seek employment and may require accommodations for their religious observance. Soon after the law was enacted in 1972, this Court narrowed its application because of constitutional concerns that, in light of recent decisions of this Court, are no longer applicable.

2. The decision of the Tenth Circuit will have the effect of encouraging unjustified rejections of religious believers at the hiring stage. By requiring applicants for employment to disclose that they may need accommodations, the Tenth Circuit's rule enables employers to avoid the inconvenience of such accommodations by denying employment to an applicant without explicitly acknowledging that the applicant's religion is a principal reason for rejection.

ARGUMENT

I.

A PRIMARY PURPOSE OF SECTION 2000e(j) WAS TO PREVENT DISCRIMINATION AGAINST SABBATH-OBSERVING APPLICANTS FOR EMPLOYMENT

A. The Meaning of the "Religion" Provision of Title VII of the 1964 Civil Rights Act Was Uncertain.

Title VII of the Civil Rights Act of 1964 included a prohibition in 42 U.S.C. 2000e-2(a)(1) and (2) against employment discrimination "because of religion."

Orthodox Jews, who are not permitted to work from sundown Friday to nightfall on Saturday and on a number of Jewish holidays, optimistically believed that the language of the 1964 Act prohibited employers subject to Title VII from refusing to hire them because of their Sabbath observance if a reasonable accommodation was possible. Before the 1964 Civil Rights law was enacted, employment discrimination against Sabbath-observing Jews, including rejection of their applications for employment, was common.

When attempts were made to invoke the 1964 Act's general prohibition against discrimination "because of religion" to situations in which employees needed accommodations in the hours of employment to meet *bona fide* religious observances, some employers maintained that the statutory term "religion" did not extend to religiously mandated conduct, but was limited to religious belief and ethnic identity. They refused to make any accommodation in their work schedules for Sabbath-observers.

In a regulation that became effective on June 15, 1966, the EEOC initially accepted this narrow reading of the 1964 Act and held that "a job applicant or employee who accepted the job knowing or having reason to believe that [normal work week and foreseeable overtime] requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs." 31 Fed. Reg. 8370 (June 15, 1966) (codified at 29 C.F.R. 1605.1(b)(3), 1966).

In 1967, the EEOC reconsidered and amended its regulations to provide: "The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." 32 Fed. Reg. 10298 (July 13, 1967) (codified at 29 C.F.R. 1605.1(b)).

B. Sabbath-Observing Applicants for Employment Continued To Be Rejected.

Notwithstanding the amended EEOC regulation Orthodox Jews continued to be rejected after employers learned of their unavailability on Friday afternoons in the winter (when sundown was as early as 4 pm on the Eastern coast of the United States) and on Jewish holidays. The experience of undersigned counsel to this *amicus* brief was typical of the situation that confronted many Orthodox Jews seeking employment. (The following paragraphs are recounted in the first person by Nathan Lewin).

Representation of Nathan Lewin: Between 1957 and 1960 I attended the Harvard Law School, where my grades placed me in the top 2% of my class and earned me a position on the *Harvard Law Review*. When I was seeking employment with law firms in

New York City in 1958 and 1959, I did not, in interviews or in the application process, initiate discussion of religious convictions that prevented me, as a Sabbath-observing Orthodox Jew, from working on late Friday afternoons in the winter, Saturdays, and certain Jewish holidays. Since my resume indicated that I had attended a religiously-affiliated Jewish college (Yeshiva College), I was often asked whether I was a Sabbath-observer. I replied that I was, but that I would attempt to complete work needed by the law firm early on Fridays and in advance of Jewish holidays.

I was the only *Harvard Law Review* member of my law-school class to receive no offer of employment from any of New York City's leading law firms. Firms had no obligation to state a reason for rejecting me, and none did. It was plain to me, however, that although many law firms had made no explicit reference to my religious observance (two suggested during interviews that if I wanted to succeed as a lawyer I should obtain a "rabbinical dispensation" to work on Saturdays and Jewish holidays) they had decided that regardless of academic performance and other qualifications, accommodation to my religious observance was too bothersome to warrant giving me an offer of employment.

Fortunately, the federal judges whom I served as a law clerk – Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit and Associate Justice John M. Harlan of the Supreme Court – made accommodations for my religious observances. See 27 Journal of Supreme Court History 154 (2002). During my subsequent

employment with the Departments of Justice and State in the 1960's, administrative personnel at these executive agencies also made it possible for me to continue observance of Orthodox Judaism by accommodating my work schedule without imposing any penalty for my absence on account of my religious observance.

When I began private practice in 1969, I was consulted by Orthodox Jewish applicants for employment in various occupations (including law-school graduates applying to law firms) who had been rejected after they notified prospective employers that they would need adjustments in work schedules in order to observe the Sabbath and Jewish holidays. Together with other volunteers of the National Jewish Commission on Law and Public Affairs ("COLPA"), I then sought regulations that would protect their religious observance.

C. <u>This Court Did Not Resolve the Central Disputed Issue</u>.

The meaning of the term "religion" in the 1964 Act became the subject of active litigation. The issue was whether the statutory term "religion" included religious observance and practice and whether employers had to make reasonable accommodations for employees' observances.

Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), arose before the 1967 EEOC regulations took effect. It was a case in which an employee who observed Sunday as a day of rest was fired for refusing to perform overtime work on Sundays. The District Court ruled, after a non-jury trial, that the discharge violated Title VII. *Dewey v. Reynolds*

Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969). The court of appeals reversed, finding, *inter alia*, that no reasonable accommodation was required under the language of the 1964 Act. 429 F.2d 324 (6th Cir. 1970).

A petition for certiorari was filed in *Dewey v. Reynolds Metals Co.*, and it was granted. 400 U.S. 1008 (1971). Briefs were filed and argument was heard on April 20-21, 1971. On June 1, 1971, this Court issued an order affirming the Sixth Circuit by an equally divided Court. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971) (Justice Harlan did not participate).[2]

D. Orthodox Jewish Organizations Proposed and Lobbied For the Current Language of Section 2000e(j).

Because of this Court's equal division Orthodox Jews seeking employment continued to suffer discrimination in hiring. Undersigned counsel, with the assistance of many members of the National Jewish Commission on Law and Public Affairs ("COLPA") and its director Dennis Rapps, initiated a

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[2] Even after the enactment of Section 2000e(j), the issue continued to divide this Court. The Sixth Circuit's decision in *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), that sustained the EEOC's reasonable-accommodation requirement, was first affirmed by an equally divided Court (429 U.S. 65 (1976)) (Justice Stevens did not participate), and was subsequently vacated and remanded in light of *TWA v. Hardison*, 432 U.S. 63 (1977). *Parker Seal Co. v. Cummins*, 433 U.S. 903 (1977).

lobbying effort to amend the 1964 Act to incorporate the substance of the 1967 EEOC regulations.[3]

Language amending other provisions of Title VII had already been approved by a subcommittee of the Senate Labor and Public Welfare Committee, so Senator Harrison Williams, the Committee's chairman, and Senator Jacob Javits, its ranking minority member, recommended that any proposed amendment protecting the rights of Sabbath-observers be proposed on the floor of the Senate by Senator Jennings Randolph of West Virginia. Senator Randolph was a Seventh-Day Baptist (observing Saturday as a Sabbath day of rest) and was a highly respected chairman of the Senate Public Works Committee. Senator Randolph took the unusual step of introducing the amendment protecting religious observance on the floor of the United States Senate when the Senate was voting on other revisions to Title VII of the 1964 Civil Rights Act. 118 *Cong. Rec.* 705 (January 21, 1972).

In support of his amendment, Senator Randolph said, "I am a member of a denomination which is a relatively small one, the Seventh-Day Baptists." *Id.* He cited "religious bodies" that have "certain strong convictions that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the

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[3]A detailed contemporaneous narrative of the full lobbying effort appears in Nathan Lewin, "A Battle Won on Purim," The Jewish Press, Vol. 23, No. 14, April 7, 1972, pp. 4, 18, 20-22, 26; see also Brief *Amicus Curiae* for the National Jewish Commission on Law and Public Affairs, *Parker Seal Co. v. Cummins*, No. 75-478, pp. 17-19.

Sabbath, be other than on Sunday." *Id.* The Senator referred explicitly to "approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons" and "an additional 425,000 men and women in the work force who are Seventh-day Adventists." *Id.*

Senator Randolph continued his address on the Senate floor by noting "that there has been a partial refusal at times on the part of employers ***to hire*** or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days." *Id.* (emphasis added). He also noted that this Court had "divided evenly" on the definition of religion. *Id.*

Following supporting statements by Senators Williams and Dominick, a vote was taken. The Randolph Amendment (now 42 U.S.C. 2000e(j)) was passed by a 55-to-nothing vote of the Senate, with 13 absent Senators noting that they would have voted "yes." 118 *Cong. Rec.* 731 (January 21, 1972).
The House Conference Committee met on February 28 and 29, 1972, and it approved the language passed by the Senate. 118 *Cong. Rec.* 6643, 6646 (March 2. 1972). The complete bill was passed by a House vote of 303-110. 118 *Cong. Rec.* 7572-7573 (March 8, 1972).

E. Section 2000e(j) Was Given Limited Effect by This Court at a Time When Burdening Others To Protect Religious Exercise Was Disfavored.

Notwithstanding the broad language of Section 2000e(j), it was given a miserly construction by a majority of this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-85 (1977). Justices

Brennan and Marshall, dissenting in *TWA v. Hardison*, described that decision as dealing "a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." 432 U.S. at 86. The dissenting opinion concludes: "The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength our hospitality to religious diversity has been seriously eroded. All Americans will be a little poorer until today's decision is erased." 432 U.S. at 97.

Lower courts have occasionally read this Court's majority opinion in *TWA v. Hardison* narrowly and have required accommodations for religious observance even when neutral seniority systems have stood in the way. *E.g.*, *Antoine v. First Student, Inc.*, 713 F.3d 824 (5th Cir. 2013); *Cosme v. Henderson*, 287 F.3d 152 (2d Cir. 2002). Although the question need not be reached in this case, it is time for this Court to recognize that *TWA v. Hardison* was decided in 1975 – a time in this Court's history when the Establishment Clause was viewed by a Court majority as a barrier to government assistance of any kind to religious observance and education.

Times have changed. This Court's 1985 decision in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), which was the peak of Establishment Clause restriction on aid to religion, was explicitly overruled in 1997 by *Agostini v. Felton*, 521 U.S. 203 (1997). In 2002 the Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which further diminished the impact of the Establishment Clause on religious education in the United States.

More recent decisions of this Court on the subject of religious observance and expression manifest a view that conflicts with the approach of the majority in *TWA v. Hardison*. See, *e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005). Although the Court may easily decide this case without overruling *TWA v. Hardison*, we urge the Court to implement the suggestion in the dissent of Justices Brennan and Marshall and "erase" that decision.

II.

REQUIRING AN APPLICANT FOR EMPLOYMENT TO DISCLOSE THAT HE OR SHE NEEDS A RELIGIOUS ACCOMMODATION WILL ENCOURAGE RELIGIOUS DISCRIMINATION THAT A REJECTED APPLICANT WILL BE UNABLE TO PROVE

The court below did not, we submit, appreciate the practical effect that its advance disclosure requirement would have on applicants for employment, and particularly on the Sabbath-observers who are the distinctive religious minority that the 1972 amendment was designed to protect. The majority opinion noted that under the EEOC's guidelines an employer is "***affirmatively discouraged***" from inquiring about a job applicant's religious beliefs because "religious affiliations or beliefs are generally viewed as non job-related and problematic under federal law." Pet. App. 53a-54a; emphasis original). But it failed to consider

what result is likely to follow – and, as we have demonstrated, what the history of job discrimination against Sabbath-observers actually demonstrated – if employers can demand that applicants notify them of potential religious conflicts with general working-conditions rules before the hiring decision is made.

An employer who is given a choice between hiring (a) an applicant who has no religious observance that would disrupt routine work-schedules and (b) an applicant whose beliefs will necessitate an accommodation will ordinarily choose the applicant who will create the least disruption. Section 2000e(j) was designed to eliminate religious observance that can be accommodated without undue hardship as a permissible factor in an employer's hiring decision. Nonetheless, as the facts of the case now before the Court tellingly demonstrate, an employer cannot be expected to ignore potential employment difficulties in making the hiring choice.

If the decision of the Tenth Circuit in this case is sustained, Sabbath-observing applicants for employment may feel compelled to disclose during a hiring interview or at some other time during the hiring process that they will need a religious accommodation under Section 2000e(j). The probable result will be that the applicant making such a disclosure will be rejected without ever being told that his religious observance affected the hiring decision. Rarely will an employee involved in the hiring decision disclose the effect that the applicant's religious observance had on the decision to reject him or her.

Since the enactment of Section 2000e(j) attorneys concerned with religious discrimination against Orthodox Jews have advised Sabbath-observing applicants for employment that they may accept jobs without disclosing in advance of the hiring decision that they will require an adjustment of their work-schedules. For the same reason, applicants who wear skullcaps ("yarmulkes") as a matter of religious observance have been advised that they should not wear religious headgear when they appear for hiring interviews. These and similar observances may be withheld until ***after*** the applicant is hired. A request for accommodation may first be made at that time.

It is, we submit, entirely fair and appropriate to expect employers to choose among applicants those who possess the best qualifications – without considering the effect of each applicant's religious observance. After an applicant has been hired, he or she should work cooperatively with the employer to devise a reasonable accommodation for a work-schedule or for religious dress while on the job.

The "notice requirement" that the court below imposed, as a matter of statutory construction, on ***all*** those who have rights protected by Title VII may, to be sure, apply when an employee who is already employed seeks a particular accommodation for religious reasons. An employer cannot be required to guess whether an employee seeks to have two days off to observe Passover or to visit the Grand Canyon. Consequently, we do not challenge the application of a "notice requirement" in cases like *Cary v. Carmichael*, 908 F. Supp. 1334 (E.D. Va. 1995), *aff'd sub nom. Cary v. Anheuser-Busch, Inc.*, 116 F.3d 472 (4th Cir. 1997), *Johnson v. Angelica Uniform Group,*

Inc., 762 F.2d 671, 673 (8th Cir. 1985), and *EEOC v. J.P. Stevens and Company, Inc.*, 740 F. Supp. 1135, 1137 (M.D.N.C. 1990), in which employers were not told by employees that religious convictions motivated their failure to follow rules applicable to other employees.

In this case, however, Ms. Elauf was denied employment because she did not explicitly state, **before she was hired**, that she would need a religious accommodation. Requiring her to notify her potential employer that she would have to be treated differently from its other employees is an invitation to the employer to reject her job application without disclosing the reason for the rejection.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel

DENNIS RAPPS
450 Seventh Avenue
44th Floor
New York, NY 10123
(718) 715-3124

NATHAN LEWIN
Counsel of Record
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
888 17th St. NW, 4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Attorneys for Amici Curiae

December 10, 2014